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Knowledge by the Jury of a Settlement Where a Plaintiff Has Settled with One or More Defendants Who Are Jointly and Severally Liable

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KNOWLEDGE BY THE JURY OF A SETTLEMENT WHERE A PLAINTIFF HAS SETTLED WITH ONE OR MORE DEFENDANTS WHO ARE JOINTLY AND SEVERALLY LIABLE

I. INTRODUCTION

Presently there is a dispute concerning what evidence should be presented to a jury and how juries should be instructed when one or more jointly liable defendants settle with the plaintiff, and other defendants remain in the lawsuit.¹ Several states have resolved this dispute statutorily² and others have done so through judge-made law.³ Three approaches have been offered in response to this dispute. Under the first approach, the jury is not informed of the settlement.⁴ The second approach informs the jury of the settlement only while withholding evidence concerning the amount of settlement.⁵ The third approach informs the jury of both the settlement and its amount.⁶ This note will discuss the split among the courts regarding the most equitable approach in this context. In order to discuss the issue of jury settlements, this note will begin with a review of the concept of joint tortfeasor liability.

1. See, e.g., *Luth v. Rogers and Babler Constr.*, 507 P.2d 761, 766 (Alaska 1973) (defendant not permitted to introduce evidence of covenant not to sue); *Steele v. Hash*, 212 Cal. App. 2d 1, 4, 27 Cal. Rptr. 853, 855 (1963) (jury has right to know of settlement and amount); *Greenemeier v. Spencer*, 719 P.2d 710, 714 (Colo. 1986) (jury should be informed of settlement); *Peck v. Jacquemin*, 196 Conn. 53, 58, 491 A.2d 1043, 1047 (1985) (settlement should not be disclosed to jury); *Brewer v. Payless Stations, Inc.*, 412 Mich. 673, 674-75, 316 N.W.2d 702, 703 (1982) (reference to settlement in presence of jury prohibited); *Azure v. City of Billings*, 182 Mont. 234, 247, 596 P.2d 460, 467 (1979) (settlement must not be disclosed to jury); *Theobald v. Angelos*, 40 N.J. 295, 304, 191 A.2d 465, 469 (1963) (existence of settlement admissible evidence while amount not disclosed); *Cleere v. United Parcel Serv.*, 669 P.2d 785, 789 (Okla. Ct. App. 1983) (evidence of settlement not admissible to prove liability, invalidity or amount of claim); *Groves v. Compton*, 280 S.E.2d 708, 711 (W. Va. 1981) (court has discretion to decide whether jury is to be informed of settlement).

2. For a discussion of cases resolving the dispute statutorily, see *infra* notes 48-68 and accompanying text.

3. For a discussion of cases resolving the dispute through judge-made law, see *infra* notes 77-138 and accompanying text.

4. *Peck v. Jacquemin*, 196 Conn. 53, 491 A.2d 1043 (1985). For a discussion of cases holding that the jury is not to be informed of a settlement, see *infra* notes 44-101 and accompanying text.

5. *Greenemeier v. Spencer*, 719 P.2d 710 (Colo. 1986). For a discussion of cases holding that the jury is to be informed of a settlement, see *infra* notes 102-28 and accompanying text.

6. *Steele v. Hash*, 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963). For a discussion of cases holding that the jury is to be informed of a settlement and its amount, see *infra* notes 129-38 and accompanying text.

ity. This note will then discuss the courts' varying approaches to the question of informing the jury of a settlement by a joint tortfeasor and their rationales for each approach. Finally, this note will conclude that the rule prohibiting the jury from learning of the settlement is the most equitable since it is the least prejudicial to the plaintiff and the remaining defendant(s).

II. JOINT AND SEVERAL LIABILITY OF JOINT TORTFEASORS

There is much confusion regarding the meaning and effect of the term "joint tort" since it has been employed in varying circumstances.⁷ Strictly defined, a joint tort occurs when the behavior of two or more tortfeasors is such that it is proper to treat the conduct of each as the conduct of the others.⁸ Thus, the existence of a concert of action⁹ or a breach of a common duty¹⁰ must be evident.¹¹ When a wrong is labeled a joint tort, the tortfeasors will be held jointly and severally liable¹² for the resulting harm.¹³ Joint and several liability is imposed because the plaintiff cannot prove the specific share of damage attributable to each defendant.¹⁴

7. 3 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* 1 (2d ed. 1986).

8. *Id.*

9. See *RESTATEMENT (SECOND) OF TORTS* § 876 (1979). Concert of action has been defined as follows:

Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. . . . The theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one.

RESTATEMENT (SECOND) OF TORTS § 876 comment a (1979); see also W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 322-24 (5th ed. 1984) (discussion of concerted action).

10. See *RESTATEMENT (SECOND) OF TORTS* § 878 (1979). Section 878 of the *Second Restatement of Torts* provides: "[i]f two or more persons are under a common duty and failure to perform it amounts to tortious conduct, each is subject to liability for the entire harm resulting from failure to perform the duty." *Id.*; see, e.g., *Bolles v. Kinton*, 83 Colo. 147, 149, 263 P. 26, 27 (1928) ("When two persons owe the same duty, and their acts tend to the same breach of duty, the wrong may be regarded as joint, and both may be held liable."); *One Hundred Seventy Second Collins Corp. v. Rosene*, 222 So. 2d 444, 445 (Fla. Dist. Ct. App. 1969) (defendants failing to perform common duty charged as joint tortfeasors); *Lansky v. Goldstein*, 141 Ga. App. 345, 346, 233 S.E.2d 437, 438-39 (1977) (co-owners of property jointly liable for tortious injury of third party).

11. F. HARPER, *supra* note 7, at 1.

12. *Id.* ("[T]he distinguishing feature of a wrong to which the label joint tort has been affixed is that the tortfeasors will be held jointly and severally—or entirely—liable for the harm proximately resulting.").

13. *Id.*

14. Wigmore, *Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923). The innocent party is relieved of the burden of proving what is impossible to prove—the specific share of harm done by each tortfeasor. *Id.*; see also 1 J. DOOLEY, *MODERN TORT LAW* 429 (1982) ("Joint and several liability was designed to obviate plaintiff's bur-

If there is neither a concert of action nor a breach of a common duty, independent concurrent¹⁵ tortious acts may combine to cause a single indivisible harm.¹⁶ Although such concurrent acts do not fall within the strict definition of a joint tort,¹⁷ courts have imposed joint and several liability on persons whose conduct causes a single indivisible harm.¹⁸ The harm must be indivisible without means of apportioning the damages.¹⁹ Thus, joint tortfeasors include those defendants whose conduct is a proximate cause of an indivisible injury.²⁰

Even after adopting comparative negligence,²¹ most states have re-

den of proving which share of the injury each of several defendants was responsible for; the burden of proof is removed from the innocent plaintiff and placed upon the wrongdoers to determine among themselves.”).

15. F. HARPER, *supra* note 7, at 3 n.9. Tortious acts need not be simultaneous to be concurrent. *Id.* Although concurrence requires no reference to time, both torts must precede the damage. *Id.* at 4 n.9.

16. *Id.* at 3-4.

17. For the definition of a joint tort, see *supra* notes 9-10 and accompanying text.

18. F. HARPER, *supra* note 7, at 4-5; see also Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 406 (1939) (“if the combined result [of the acts] is a single and indivisible injury, the liability should be entire.”). As a student editor of his law review, John H. Wigmore proposed the single indivisible harm rule. Wigmore, *supra* note 14, at 459. Wigmore commented: “The rule should be: *Wherever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole.*” *Id.* (emphasis in original).

19. F. HARPER, *supra* note 7, at 5. To avoid joint liability, a co-tortfeasor has the burden of proving which tortious act caused which harm. WIGMORE, *supra* note 14, at 458.

20. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 257 (2d ed. 1986); see also *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). In *American Motorcycle*, the court in reviewing the concept of joint and several liability noted: “Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause.” *Id.* at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187.

21. When the concept of comparative negligence was new, Dean Prosser defined it as “a comparison of the fault of the plaintiff with that of the defendant. It does not necessarily result in any division of the damages, but may permit full recovery by the plaintiff notwithstanding his contributory negligence.” V. SCHWARTZ, *supra* note 20, at 29 (quoting Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 n.2 (1953)).

There are two principle forms of comparative negligence—pure and modified. See V. SCHWARTZ, *supra* note 20, at 30. Pure comparative negligence allows a negligent plaintiff to recover even though his negligence was greater than the defendant's. *Id.* Under modified comparative negligence, the plaintiff cannot recover unless he is less negligent than the defendant. *Id.* at 30-31. Some forms of modified comparative negligence permit the plaintiff to recover if his negligence is equal to or less than the defendant's. *Id.*

For example, the comparative negligence statute of Pennsylvania permits a plaintiff to recover where the plaintiff's negligence is equal to or less than the negligence of the defendant. 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982). Because the “plaintiff may recover the full amount of the allowed recovery from

tained the doctrine of joint and several liability.²² In those jurisdictions, a plaintiff has the right to recover the total amount of his damages from any tortfeasor.²³ While most states have adopted comparative negligence, it is in those states which have retained the doctrine of joint and several liability that the propriety of informing a jury of the existence or amount of plaintiff's settlement with an absent tortfeasor is most often debated.²⁴

any defendant against whom the plaintiff is not barred from recovery," joint and several liability is retained under comparative negligence in Pennsylvania. *Id.* For a discussion of the impact of comparative negligence in Pennsylvania on settlements and releases, see Griffith, Hemsley & Burr, *Contribution, Indemnity, Settlements, and Releases: What the Pennsylvania Comparative Negligence Statute Did Not Say*, Symposium: *Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 494 (1979). For a discussion of the various forms of comparative negligence, see V. SCHWARTZ, *supra* note 20, at 29-32.

22. V. SCHWARTZ, *supra* note 20, at 258; see also *Coney v. J.L.G. Indus.*, 97 Ill. 2d 104, 126, 454 N.E.2d 197, 207 (1983) (joint and several liability retained under comparative negligence); *Rozevink v. Faris*, 342 N.W.2d 845, 849 (Iowa 1983) (doctrine of joint and several liability applicable under comparative negligence unless plaintiff bears any comparative negligence); IDAHO CODE § 6-803(4) (1979) ("joint tortfeasor" means one (1) of two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them"); UTAH CODE § 78-27-40(3) (1985) ("joint tortfeasor" means one of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them"); WYO. STAT. ANN. § 1-1-110(h) (1977) (other tortfeasor statutes "do not affect the common law liability of the several joint tortfeasors to have judgments recovered and payment made from them individually by the injured person for the whole injury"). For a further discussion of states that have retained joint and several liability, see V. SCHWARTZ, *supra* note 20, at 258-61.

In *Coney*, the Supreme Court of Illinois advanced four reasons for retaining joint and several liability co-existent with comparative negligence. 97 Ill. 2d at 121-22, 454 N.E.2d at 205. First, the court reasoned that apportioning fault on a comparative basis does not render an indivisible injury "divisible" where a defendant's negligence is a proximate cause of an indivisible injury. *Id.* at 121, 454 N.E.2d at 205. The court explained: "The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury." *Id.* at 122, 454 N.E.2d at 205. Second, where a plaintiff is negligent and one or more defendants is insolvent, the plaintiff is not forced to bear a portion of the loss when joint and several liability is retained. *Id.* Third, although a plaintiff may be partially at fault, his negligence relates only to his own safety while the negligence of the defendants relates to a lack of due care for others. *Id.* Fourth, if a defendant could not satisfy a judgment against him, an injured plaintiff would not be adequately compensated for his injuries if joint and several liability were eliminated. *Id.*

23. See J. DOOLEY, *supra* note 14, at 685. The injury itself is indivisible, but the responsibility for the injury is apportioned among two or more defendants. See F. HARPER, *supra* note 7, at 29.

24. This note will not address issues relevant to practitioners in states that have abolished joint and several liability. In the absence of joint and several liability, comparative negligence requires a defendant to pay only his proportionate share of the damages. See J. DOOLEY, *supra* note 14, at 157. The fact that

Tort actions involving joint tortfeasors do not always result simply in a judgment against both defendants for a fixed amount. Rather, the action can be quite complicated because one party has obtained a release pursuant to a settlement with the plaintiff.²⁵ At common law, a release given to one of two or more tortfeasors released all tortfeasors.²⁶ To circumvent this often harsh result, a document known as a covenant not to sue was used rather than a release.²⁷ In such a document, the plaintiff does not surrender his cause of action, but simply agrees not to enforce it.²⁸ Today, many state statutes alter the common law rule to provide that a release does not discharge all tortfeasors.²⁹ In addition, such statutes often dictate the effect of a set-

a plaintiff has settled with and released a tortfeasor will have no bearing on the amount of the judgment against other tortfeasors. *Id.*

25. See PROSSER & KEETON, *supra* note 9, at 332. A distinction must be made between a release and a satisfaction. *Id.* A release is a surrender of a cause of action. *Id.* A satisfaction is acceptance of full compensation for an injury while a release may be gratuitous or for inadequate consideration. *Id.*; see also F. HARPER, *supra* note 7, at 32. The fact that a plaintiff has given a release does not necessarily indicate that he has received full compensation—satisfaction—for his injury. *Id.*

26. PROSSER & KEETON, *supra* note 9, at 332. In the eyes of the law, there was one cause of action against all tortfeasors liable for the same acts. *Id.*; see, e.g., *Duck v. Mayeu*, [1892] 2 Q.B. 511, 513 ("a release granted to one joint tortfeasor . . . operates as a discharge of the other joint tortfeasor . . . the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released").

27. *Cox v. Pearl Inv. Co.*, 168 Colo. 67, 450 P.2d 60 (1969). The court held that a "Covenant Not to Proceed with Suit" did not operate as a release where the plaintiff expressly reserved the right to sue others who might be liable. *Id.* at 73-74, 450 P.2d at 63. The *Second Restatement of Torts* states "[a] covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor liable for the same harm." RESTATEMENT (SECOND) OF TORTS § 885(2) (1979).

28. PROSSER & KEETON, *supra*, note 9, at 334. Although a technical evasion, the form of the instrument is extremely important in some jurisdictions. *Id.* Compare *Oliver v. Williams*, 19 Tenn. App. 54, 59, 83 S.W.2d 271, 274 (1935) (written instrument was covenant not to sue where there was no stipulation that instrument may have been pleaded as defense to action brought against covenantee) with *Byrd v. Crowder*, 166 Tenn. 215, 217, 60 S.W.2d 171, 171 (1933) (instrument containing stipulation that agreement may be pleaded as defense treated as release). However, other jurisdictions regard intent over form and look to the four corners of the document. *Id.*; see, e.g., *Albert's Shoes, Inc. v. Crabtree Constr. Co.*, 89 So. 2d 491, 493 (Fla. 1956) (courts must consider entire document to ascertain intention of parties); *Atlantic Coast Line R.R. v. Boone*, 85 So. 2d 834, 842 (Fla. 1956) (where intent can be determined from language of instrument, such intent is conclusive in determination of nature of instrument).

29. PROSSER & KEETON, *supra* note 9, at 334. In 1939, the National Conference of Commissioners on Uniform State Laws approved and adopted the Uniform Contribution Among Tortfeasors Act. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-NINTH ANNUAL CONFERENCE 136 (1939) [hereinafter HANDBOOK]. Section 4 of the Uniform Contribution Among Tortfeasors Act was intended to change the common law view that a release given to one of two or more

tlement on the plaintiff's claim against any remaining tortfeasors.³⁰ For example, according to the Uniform Contribution Among Tortfeasors Act (UCATA) the plaintiff's claim is reduced by the greater of the amount stipulated by the release or the amount of consideration paid for the release.³¹

Frequently, courts employ two different methods to determine the effect of a settlement and release on a claim against a tortfeasor who remains a party to the suit—a *pro tanto*³² reduction or a *pro rata*³³ reduc-

tortfeasors automatically releases the others. *Id.* at 246. Section 4 of the 1939 Act provided:

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

Id. Eight states including Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota enacted the Uniform Contribution Among Tortfeasors Act of 1939, although some states made changes from the original Act. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57, 59 commissioners' prefatory note (1955 revision) (1975) [hereinafter UCATA].

Because of the changes some states made, the Commissioners drafted a revision of the Act of 1939 and approved the revision in 1955. *Id.* Section 4, providing for the effects of a release or covenant not to sue, remains similar. *Id.* Section 4 of the 1955 revision of the Uniform Contribution Among Tortfeasors Act provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability to any other tortfeasor.

UCATA § 4, 12 U.L.A. at 98. Several states have enacted statutes which are almost identical to Section 4. *See, e.g.,* CAL. CIV. PROC. CODE § 877 (West 1980); COLO. REV. STAT. § 13-50.5-105 (Supp. 1985); WYO. STAT. ANN. § 1-1-113 (Michie 1977).

30. UCATA § 4(a), 12 U.L.A. at 98. The "release . . . reduces the claim against the others to the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it, whichever is the greater." *Id.* For the full text of § 4, see *supra* note 29.

31. UCATA § 4(a), 12 U.L.A. at 98. For the relevant provision of the UCATA that provides for the method of reduction of plaintiff's claim, see *supra* note 30.

32. "The [*pro tanto* credit] rule dictates that consideration received from a joint tortfeasor [for a release] reduces *pro tanto* (to that extent) any recovery against the other tortfeasors." *Wadle v. Jones*, 312 N.W.2d 510, 512 (Iowa 1981) (citing *Greiner v. Hicks*, 231 Iowa 141, 146-47, 300 N.W. 727, 731 (1941)). For a discussion of the *pro tanto* credit rule, see *infra* notes 35-38 and accompanying text.

tion.³⁴ The *pro tanto* credit rule reduces the plaintiff's recovery against the non-settling tortfeasors by the full amount of the settlement.³⁵ This method permits the plaintiff full compensation for his injuries and supports the universal rule that there can be only one satisfaction for an injury.³⁶ Because courts espousing a *pro tanto* credit reduction need not inform the jury of an absent joint tortfeasor,³⁷ the court will deduct the settlement amount from the jury's verdict by following what is often termed the "court rule."³⁸

33. The *pro rata* credit rule reduces the recovery against the non-settling tortfeasors by the amount of the settling tortfeasor's proportionate share of the verdict. *Wadle v. Jones*, 312 N.W.2d 510, 513 (Iowa 1981). For a discussion of the *pro rata* rule, see *infra* notes 39-43 and accompanying text.

34. J. DOOLEY, *supra* note 14, at 204 (Supp. 1985).

35. *Id.*; see also *Mayhew v. Berrien County Rd. Comm'n*, 414 Mich. 399, 326 N.W.2d 366 (1982). In *Mayhew*, the court interpreted Michigan's release statute as providing for a *pro tanto* reduction in damages. *Id.* at 407, 326 N.W.2d at 369. The statute provided, in pertinent part: "When a release . . . is given in good faith . . . [i]t reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release . . . or to the extent of the amount of the consideration paid for it, whichever amount is greater." MICH. COMP. LAWS ANN. § 600.2925d (West 1986).

36. *Wadle v. Jones*, 312 N.W.2d 510, 513 (Iowa 1981) (quoting *Greiner v. Hicks*, 231 Iowa 141, 146-47, 300 N.W. 727, 731 (1941)). In *Wadle*, the Iowa Supreme Court applied the *pro tanto* credit rule to affirm the trial court's reduction of the jury's verdict of \$45,125.59 to \$125.59 by deducting the plaintiff's settlement with another defendant from the jury award. 312 N.W.2d at 512.

In *American Motorcycle Ass'n v. Superior Court*, the California Supreme Court in dictum concluded that "a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury." 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978). The relevant California statute provides that a release "shall reduce the claims against the others in the amount stipulated by the release . . . or in the amount of the consideration paid for it whichever is the greater." CAL. CIV. PROC. CODE § 877 (West 1980).

In *Baget v. Shepard*, a California appellate court interpreted the language "amount stipulated" in that state's statute to mean "the percentage amount of responsibility attributable to the settling tortfeasor's tortious conduct." J. DOOLEY, *supra* note 14, at 203 (Supp. 1985) (citing *Baget v. Shepard*, 128 Cal. App. 3d 433, 180 Cal. Rptr. 396 (1982)). The officially published opinion was ordered removed from the California Appellate Reports. 128 Cal. App. 3d 433.

37. For a general discussion of cases where courts prohibit informing the jury of plaintiff's settlement with a joint tortfeasor, see *infra* notes 44-101 and accompanying text.

38. See, e.g., *DeLude v. Rimek*, 351 Ill. App. 466, 115 N.E.2d 561 (1953). In *DeLude*, the court held:

[I]t is the function of the jury to find the plaintiff's total damages, and the function of the judge, upon application of the defendant after verdict, to find the amount by which such verdict should be reduced by virtue of any covenant made by the plaintiff with another concerned in the commission of the tort.

Id. at 474, 115 N.E.2d at 565.

For other courts that follow the "court rule" or "court method," see *Luth v. Rogers and Babler Constr. Co.*, 507 P.2d 761, 768 (Alaska 1973) (court method

In contrast, under the *pro rata* credit rule, the jury must have knowledge of an absent joint tortfeasor³⁹ in order to apportion the negligence of the non-settling tortfeasors.⁴⁰ A tortfeasor's *pro rata* share of liability is determined by multiplying his percentage of liability, as determined by the jury, by the amount of the verdict.⁴¹ Under the *pro rata* credit rule, a plaintiff may receive a windfall if a large settlement precedes a subsequently large judgment because the jury allocates, rightly or wrongly, a heavy proportion of fault to the non-settling defendants.⁴²

avoids prejudice and encourages extra-judicial settlement); *Egurrola v. Szychowski*, 95 Ariz. 194, 198-99, 388 P.2d 242, 245 (1964) (credit for previous payment is properly determined by court method of *DeLude*); *Brooks v. Daley*, 242 Md. 185, 193, 218 A.2d 184, 188 (1966) (method of letting jury apply prior payment in reduction of verdict against non-settling joint tortfeasor is far less satisfactory than that of having court make necessary reduction at conclusion of trial); *Brewer v. Payless Stations, Inc.*, 412 Mich. 673, 679, 316 N.W.2d 702, 705 (1982) (court method more consistent with policy of encouraging settlements).

The *Luth* court preferred the court method to the "jury method" which permits the jury to know the amount of the settlement and to deduct that amount from its award. *Luth*, 507 P. 2d at 768. Emphasizing that it is nearly impossible to ensure that the jury makes the appropriate deduction from the total damages awarded the *Luth* court noted that the preferable "court method" of calculating damages avoids prejudice and encourages extra-judicial settlements. *Id.* For a discussion of the facts of *Luth*, see *infra* notes 82-91 and accompanying text.

For application of the "jury method" of calculating damages, see *Steele v. Hash*, 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963) (affirming trial court's instruction to jury to deduct amount of settlement from verdict); *Haley v. Byers Transp.*, 394 S.W.2d 412, 415 (Mo. 1965) (jury instructed to deduct previous settlement amount of \$80,000 from verdict).

39. Although the jury must have knowledge of an absent joint tortfeasor, it is not necessary that the jury know that an absent joint tortfeasor has settled. See *Azure v. City of Billings*, 182 Mont. 234, 247, 596 P.2d 460, 467 (1979). For a relevant quote from the *Azure* court, see *infra* note 187.

40. See V. SCHWARTZ, *supra* note 20, at 264; see also *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979). In *Bartels*, the court concluded that a provision of a state statute governing the effect of a release on a plaintiff's claim against a joint tortfeasor had been impliedly repealed by the enactment of a comparative negligence act. *Id.* at 121. The release statute provided that a release "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." *Id.* at 116 (emphasis added). The *Bartels* court concluded that the emphasized language was repealed and substituted with "of the relative degree of fault (percentage of negligence) attributable to the released joint tortfeasors." *Id.* at 121. The court concluded that as a result, the award of damages to the plaintiff must be reduced by an amount proportionate to the percentage of negligence allocated to the released tortfeasor. *Id.* at 122.

41. *Nobriga v. Raybestos-Manhattan, Inc.*, 67 Haw. 157, 161, 683 P.2d 389, 392 (1984). For example, suppose the jury returned a verdict of \$50,000 damages against the defendant (the non-settling tortfeasor) and determined the defendant was 75% liable and the settling tortfeasor was 25% liable. The defendant's *pro rata* share is \$37,500, and the settling tortfeasor's *pro rata* share is \$12,500.

42. V. SCHWARTZ, *supra* note 20, at 264; see also *Wadle v. Jones*, 312 N.W.2d 510, 513 (Iowa 1981) ("Adoption of the *pro rata* credit rule would allow a claimant who has made a settlement that exceeds the settling tortfeasor's *pro rata*

However, the plaintiff may receive less than full compensation if he settles with one tortfeasor for an amount less than the *pro rata* share of the settling tortfeasor's liability.⁴³

While there are conflicting approaches to calculating damages where the remaining co-defendant is liable and a co-defendant previously settled with the plaintiff, there is also conflict concerning what references to the absent co-defendant or settlement can be made to the jury. The remaining portion of this note will discuss the three varying approaches to this dispute.

III. LIMITATION OF THE ADMISSIBILITY OF SETTLEMENT AGREEMENTS WHEN ONE OR MORE JOINTLY AND SEVERALLY LIABLE DEFENDANTS SETTLE WITH PLAINTIFF

A. *The Majority View: Withholding All Evidence of Settlement from the Jury*

State courts have espoused three views as to what the jury should be told about a settlement between the plaintiff and a tortfeasor when another tortfeasor remains as a defendant in the action.⁴⁴ The majority view prohibits the court in some forums from informing the jury of a settlement.⁴⁵ This prohibition is invoked in order to avoid prejudice to either party and to promote settlements.⁴⁶

share of the verdict to recover more than full compensation for personal injuries.”).

43. V. SCHWARTZ, *supra* note 20, at 264. Because a *pro rata* share cannot be calculated before the liability of the non-settling tortfeasors has been decided, a plaintiff may be reluctant to settle because he does not know what he is giving up when he gives a release to a tortfeasor. UCATA § 4, 12 U.L.A. at 99 (commissioner's comment).

44. For a statement of the three views and cases which espouse each view, see *supra* notes 4-6 and accompanying text.

45. See, e.g., *Luth v. Rogers and Babler Constr.*, 507 P.2d 761, 766 (Alaska 1973) (defendant not permitted to introduce evidence of covenant not to sue); *Peck v. Jacquemin*, 196 Conn. 53, 58, 491 A.2d 1043, 1046 (1985) (settlement should not be disclosed to jury). For a discussion of the extent to which evidence of settlement is withheld from the jury, see *infra* notes 47-100 and accompanying text.

46. See, e.g., *Luth v. Rogers and Babler Constr.*, 507 P.2d 761, 768 (Alaska 1973) (withholding information from jury regarding settlement avoids prejudice and encourages extra-judicial settlements); *Egurrola v. Szychowski*, 95 Ariz. 194, 198, 388 P.2d 242, 244 (1964) (letter from settled defendant to plaintiff regarding settlement amount properly excluded from evidence); *Peck v. Jacquemin*, 196 Conn. 53, 58, 491 A.2d 1043, 1046 (1985) (trial court erred by permitting defendant counsel to cross-examine plaintiff concerning release); *Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So. 2d 335, 336 (Fla. Dist. Ct. App. 1984) (settlement agreement inadmissible to rebut defendant's references to settled tortfeasor as independent eyewitness); *DeLude v. Rimek*, 351 Ill. App. 466, 115 N.E.2d 561 (1953) (jury must calculate plaintiff's total damages absent evidence of settlement); *Brooks v. Daley*, 242 Md. 185, 193, 218 A.2d 184, 189 (1966) (informing jury of settlement misleads them in deliberations); *Brewer v. Payless Stations, Inc.*, 412 Mich. 673, 679, 316 N.W.2d 702, 705 (1982) (uncertainty of juror reaction to existence of settlement is “foreseeable deterrent” to out of

Under this majority view, numerous states have used a variety of approaches regarding the extent to which evidence of settlement will be withheld. These approaches have ranged from a complete withholding of evidence of settlement to a withholding of evidence only for the purposes of proving liability.⁴⁷ Two states, Connecticut and Florida, have statutorily provided for a complete prohibition.⁴⁸ The Connecticut statute specifically prohibits the reading of a settlement agreement to a jury or introducing a settlement into evidence during the trial.⁴⁹ In *Peck v.*

court settlements); *Azure v. City of Billings*, 182 Mont. 234, 245, 596 P.2d 460, 467 (1979) (jury must not be "influenced by extraneous factors which will creep into the jury's decision-making process"); *Cleere v. United Parcel Serv.*, 669 P.2d 785, 789 (Okla. Ct. App. 1983) (disclosure of settlement agreement frustrates the policy "favoring settlements of lawsuits").

47. See, e.g., *Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So. 2d 335, 337 (Fla. Dist. Ct. App. 1984) ("offers of compromise and settlement may not be introduced except under unusual circumstances"); *Weingrad v. Philadelphia Elec. Co.*, 324 Pa. Super. 16, 20, 471 A.2d 100, 102 (1984) (settlement inadmissible except where pleaded as complete defense); FED. R. EVID. 408 (evidence of compromise not admissible to prove liability, invalidity or amount of claim, but may be admitted if offered for another purpose, such as proving bias or prejudice of witness); CONN. GEN. STAT. ANN. § 52-216a (West Supp. 1986) (agreement with any tortfeasor not to bring legal action is not to be read to jury or in any other way introduced in evidence); FLA. STAT. ANN. § 768.041 (West 1986) (fact of release or covenant not to sue shall not be made known to jury); 42 PA. CONS. STAT. ANN. § 6141(c) (Purdon 1982) (settlement not admissible except where pleaded as complete defense).

48. See CONN. GEN. STAT. ANN. § 52-216a (West Supp. 1986); FLA. STAT. ANN. § 768.041 (West 1986).

49. See CONN. GEN. STAT. ANN. § 52-216a (West Supp. 1986). The statute provides:

An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among plaintiffs or defendants in the action be read or in any other way introduced to a jury.

Id. A provision of the original statute was found unconstitutional by the Connecticut Supreme Court in 1982. *Seals v. Hickey*, 186 Conn. 337, 441 A.2d 604 (1982). The original statute gave the court discretion to reduce the damage award by the amount of the settlement. *Id.* at 350, 441 A.2d at 610. The *Seals* court held that allowing the trial court to substitute its judgment for that of the jury denied the parties their constitutional right to have their total damages determined by a jury. *Id.* at 352, 441 A.2d at 611. In 1982, the Connecticut legislature amended the statute to provide that when the trial court concludes that the jury verdict is excessive or inadequate as a matter of law, it shall order a remittitur or an additur. See *Peck v. Jacquemin*, 196 Conn. 53, 69-70, 491 A.2d 1043, 1052 (1985). If a party fails to comply with an order for an additur or remittitur, the court must set aside the verdict and order a new trial. *Id.* at 70, 491 A.2d at 1052.

In *Seals*, the court indicated that the statute was introduced into the legislature "[t]o prohibit the reading of agreements not to sue or releases of claims before a jury, which often prejudices a party to the action." 186 Conn. at 345, 441 A.2d at 608 (emphasis supplied by the court).

Jacquemin,⁵⁰ the Connecticut Supreme Court held that the state statute precluded defense counsel from introducing evidence of plaintiff's settlement with another tortfeasor, noting specifically that the statute "expresse[d] the better policy, removing whatever possibility for prejudice may exist"⁵¹

Florida statutorily provides that a jury shall not be told of a release given by the plaintiff to a tortfeasor.⁵² In *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*,⁵³ the appellate court held that a jury should not have been told that a witness, who had been a defendant, had settled with the plaintiff.⁵⁴ In *Ashby*, the plaintiff, a plumber, was injured when he fell while descending from a ladder manufactured by defendant Consolidated Aluminum Corporation and provided by the owner of the house on which he was working.⁵⁵ Plaintiff sued both the owner of the house and the manufacturer of the ladder, but prior to trial settled with the house owner.⁵⁶ When defense counsel introduced the house owner as a witness and referred to him as an "independent eyewitness," plaintiff's counsel informed the jury of the house owner's settlement with plaintiff.⁵⁷ Relying on Florida's statute prohibiting a jury from having knowledge of a settlement, the Florida Court of Appeals stated that the trial court erred in permitting the plaintiff to introduce evidence of the settlement to rebut the defendant's references to the settled defendant as an "independent eyewitness."⁵⁸ The court reasoned that since public policy favors settlements, evidence of a settlement is only admissible under unusual circumstances.⁵⁹

50. 196 Conn. 53, 491 A.2d 1043 (1985). The plaintiff Peck was a passenger in a car involved in a two-car accident. *Id.* at 54, 491 A.2d at 1044. The injured Peck sued the drivers of both cars and subsequently settled for \$100,000 with the driver in whose car he had been a passenger. *Id.* Over the plaintiff's objection, the trial court permitted the remaining defendant Roy to introduce evidence of the settlement at trial. *Id.* at 56, 491 A.2d at 1045. In addition, the trial court instructed the jurors to consider the \$100,000 settlement in mitigation of any damages which they might award the plaintiff. *Id.* at 57 n.8, 491 A.2d at 1046 n.8. The jury returned a verdict for \$35,000 against the defendant Roy. *Id.* at 60, 491 A.2d at 1047.

51. *Id.* at 59, 491 A.2d at 1047 (quoting *Kosko v. Kohler*, 176 Conn. 383, 387, 407 A.2d 1009, 1011 (1978)).

52. See FLA. STAT. ANN. § 768.041(3) (West 1986). Section 768.041(3) provides that "[t]he fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury." *Id.*

53. 458 So. 2d 335 (Fla. Dist. Ct. App. 1984).

54. *Id.* at 336.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* The court did not accept the plaintiff's argument that the "defendant had opened the door to the issue of the witness's credibility." *Id.* at 337. For the relevant Florida statute for excluding evidence of settlement, see *supra* note 52.

59. *Id.* One court noted that "unusual circumstances exist where some spe-

Statutorily, Pennsylvania provides a narrow exception to an evidentiary rule prohibiting the admission of a settlement.⁶⁰ The statute provides that a settlement is not admissible except where a final settlement is pleaded as a complete defense.⁶¹ In *Weingrad v. Philadelphia Electric Co.*,⁶² the Pennsylvania Superior Court relied on the statute in holding that the trial court erred in admitting evidence of plaintiff's settlement with another party.⁶³ In *Weingrad*, plaintiff sued a pilot and the Philadelphia Electric Company (PECO) for the death of her husband, a flight-instructor.⁶⁴ Plaintiff settled with the pilot before trial, a fact that the

cies of fraud or other questionable practice is indulged in to procure or influence such testimony" of a witness. *City of Coral Gables v. Jordan*, 186 So. 2d 60, 63 (Fla. Dist. Ct. App.) (quoting *Fenberg v. Rosenthal*, 348 Ill. App. 510, 518, 109 N.E.2d 402, 405 (1952)), *aff'd*, 191 So. 2d 38 (Fla. 1966).

See also *Charles McArthur Dairies*, 449 So. 2d 998, 999 (Fla. Dist. Ct. App. 1984) (disclosing release and amount of settlement may unduly influence jury as to plaintiff's damages); *Henry v. Beacon Ambulance Serv.*, 424 So. 2d 914, 915 (Fla. Dist. Ct. App. 1982) (trial court should have granted mistrial after defendant's counsel informed jury during closing argument that plaintiff had settled with another defendant); *Webb v. Priest*, 413 So. 2d 43, 46 (Fla. Dist. Ct. App. 1982) (reversible error for trial court to permit defendants to bring repeatedly to jury's attention fact that two other defendants had been dismissed). But see *Cenvill Communities, Inc. v. Patti*, 458 So. 2d 778 (Fla. Dist. Ct. App. 1984), *review denied*, 467 So. 2d 1000 (Fla. 1985). In *Patti*, a Florida appellate court concluded that mention of a "claim" is not specifically prohibited by the Florida release statute. *Id.* at 780 (citing FLA. STAT. ANN. § 768.041(3) (West 1986)). While walking in Century Village, the plaintiff's husband was struck and killed by a car driven by the defendant Hoffman. *Id.* at 779. Plaintiff sued Hoffman, Century Village and Cenvill Communities and settled with Hoffman prior to trial. *Id.* Cenvill asserted by affirmative defense that Hoffman's act was an intervening cause and the sole proximate cause of the husband's death. *Id.* In his opening statement, counsel for one defendant said, "'we expect the evidence and testimony in this case will reflect [that] Mrs. Patti made a claim against Mr. Hoffman as a result of this accident.'" *Id.* Although the plaintiff asserted that the statement should not have been admitted because "where a claim has been made the inference arises that a settlement has been reached," the appellate court concluded that defendant's references to Hoffman were properly admitted since Cenvill had asserted by affirmative defense that Hoffman's act was an intervening cause, and because the plaintiff's attorney had failed to object to defendant's references to the settlement agreement throughout his closing argument. *Id.* at 780-81.

60. See 42 PA. CONS. STAT. ANN. § 6141(c) (Purdon 1982). Section 6141(c) provides: "Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) [personal injuries] and (b) [damages to property] shall not be admissible in evidence on the trial of any matter." *Id.*

61. 42 PA. CONS. STAT. ANN. § 6141(c) (Purdon 1982). For the text of the Pennsylvania statute prohibiting admissibility of a settlement except where it is pleaded as a complete defense, see *supra* note 60.

62. 324 Pa. Super. 16, 471 A.2d 100 (1984).

63. *Id.* at 20, 471 A.2d at 102.

64. *Id.* at 17, 471 A.2d at 101. The plaintiff's decedent was administering a flight review to the pilot. *Id.* During a simulated low altitude engine failure, the airplane hit a pole owned by PECO. *Id.*

trial court announced to the jury.⁶⁵ When the jury rendered a verdict in favor of PECO, plaintiff filed an appeal contending that the trial court erred in informing the jury of the settlement.⁶⁶ The Pennsylvania Superior Court agreed that the trial court erred; however, the appellate court concluded that the plaintiff had not been prejudiced by the error.⁶⁷ The court reasoned that because the jury had not found the pilot negligent, they could not have assumed that the only liable party had settled.⁶⁸

Rule 408 of the Federal Rules of Evidence, regarding compromise and offers to compromise, prohibits admission of evidence of a compromise introduced to prove liability, invalidity or amount of a claim.⁶⁹

65. *Id.* The trial judge informed the jury:

I am not asking you to draw any inference from the facts of the settlement, though various Counsel may wish to ask you to draw an inference. You may or may not consider the facts of this settlement significant in evaluating the position of the parties and the testimony of the witness.

Id. at 18, 471 A.2d at 101.

66. *Id.* The trial court had denied plaintiff's motion for a new trial. *Id.* at 17-18, 471 A.2d at 101. Plaintiff argued that "introduction of the settlement created the risk of confusing the jury and causing speculation as to whether the liable party was still in the case, or whether the plaintiff had received all of the damages to which she was entitled." *Id.* at 21, 471 A.2d at 103.

67. *Id.* at 22-23, 471 A.2d at 103-04.

68. *Id.* at 22, 471 A.2d at 104. In strong dissent, Judge Montgomery, stated:

I believe that the legislative rationale for that statute [42 PA. CONS. STAT. ANN. § 6141] was that a jury, upon learning of a settlement, could decide to reduce or eliminate any award to an otherwise eligible plaintiff based upon the conclusion that the plaintiff had already received a recovery to the extent that he or she was entitled to or satisfied within the settlement which had been reached. The jurors could conclude that to award further damages would create a windfall. Moreover since the jury specifically found . . . [the released defendant] not to have been negligent in this case, it is reasonable to speculate that the jury members could have reached the conclusion that the Plaintiff had received some monies from that defendant to which she was not entitled, so that the jury would therefore think it fair to deny her any recovery from any other party, against whom an award might otherwise have been made. There is simply no way to determine whether or not such prejudicial considerations resulted from the disclosure of settlement to the jury in the instant case.

Id. at 23, 471 A.2d at 104 (Montgomery, J., dissenting).

69. FED. R. EVID. 408. Rule 408 on compromise and offers to compromise provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or preju-

However, rule 408 "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness."⁷⁰ In *Young v. Verson Allsteel Press Co.*,⁷¹ the defendant sought to introduce evidence of plaintiff's settlement with a joint tortfeasor to minimize its potential exposure in damages.⁷² The defendant contended that the evidence was offered for "another purpose," to prevent

dice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id. "While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto." FED. R. EVID. 408 advisory committee's note.

In recent decisions, federal courts have applied rule 408 to prohibit admission of a settlement. *See, e.g.*, *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 248 (1st Cir. 1985) (error for trial court to admit release offered as relevant to issue of causation); *Belton v. Fibreboard Corp.*, 724 F.2d 500, 505 (5th Cir. 1984) (error for trial court to instruct jury to consider settlement as part of proof of claim); *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161, 166-67 (5th Cir. 1983) (error to admit settlement to establish liability of defendant); *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (inadmissibility of settlement negotiations encourages full and open disclosure, furthering public policy favoring settlements); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1107 (5th Cir. 1981) (collection of statements made in course of effort to compromise inadmissible); *Fidelity & Deposit Co. of Md. v. Hudson United Bank*, 493 F. Supp. 434, 445 (D. N.J. 1980) (utilizing settlement as admission of validity of claim prohibited).

Several states have enacted statutes that are similar to rule 408 of the Federal Rules of Evidence. *See, e.g.*, DEL. CODE ANN., UNIFORM RULES OF EVIDENCE 408 (1981); OKLA. STAT. ANN. tit. 12, § 2408 (West 1980); WIS. STAT. ANN. § 904.08 (West 1985). In *Cleere v. United Parcel Serv.*, the Oklahoma Court of Appeals applied OKLA. STAT. ANN. tit. 12, § 2408 and found that the trial court committed reversible error by permitting defendant to introduce plaintiff's settlement with other tortfeasors for the purpose of reducing the amount of damages awarded to plaintiff. 669 P.2d 785, 790 (Okla. Ct. App. 1983).

On one occasion, the Wisconsin Supreme Court permitted disclosure of a settlement agreement offered to prove bias or prejudice of a witness as proscribed under WIS. STAT. ANN. § 904.08. *Hareng v. Blanke*, 90 Wis. 2d 158, 168, 279 N.W.2d 437, 441-42 (1979) (settlement agreement admitted to show prejudice on part of plaintiff).

70. FED. R. EVID. 408; *see also* *Brocklesby v. United States*, 767 F.2d 1288, 1292-93 (9th Cir. 1985) (indemnity agreement admitted to show relationship of parties and to attack credibility of defendants' witnesses), *cert. denied*, 106 S. Ct. 882 (1986); *Belton v. Fibreboard Corp.*, 724 F.2d 500, 505 (5th Cir. 1984) (admission of settlement for purpose of explaining to jury why co-defendants were not in court is not abuse of discretion); *Breuer Elec. Mfg. Co. v. Toronado Sys. of America*, 687 F.2d 182, 185 (7th Cir. 1982) (evidence of settlement negotiations admissible to rebut defendants' assertions that they were unaware of issues until suit was filed); *Central Soya Co. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982) (testimony admissible for purpose of demonstrating terms of settlement); *California Hawaiian Sugar Co. v. Kansas City Terminal Warehouse Co.*, 602 F. Supp. 183, 188 (W.D. Mo. 1985) (settlement negotiations admissible to explain why plaintiffs delayed in disposing of sugar), *aff'd*, 788 F.2d 1331 (8th Cir. 1986).

71. 539 F. Supp. 193 (E.D. Pa. 1982).

72. *Id.* at 194. Defendant asserted that it could suffer prejudice if the jury

unnecessary and substantial prejudice from accruing to defendant.⁷³ However, the court noted that defendant's offer of plaintiff's settlement was to mitigate the amount of any possible jury award by showing that the plaintiff had received some compensation for his injuries.⁷⁴ Reasoning that defendant's contention of "another purpose" was merely an attempt to circumvent what rule 408 expressly prohibits, the court refused to admit evidence of the settlement as proof of the invalidity or amount of plaintiff's claim.⁷⁵ Additionally, the court recognized that admitting the settlement in this case would have an effect on future plaintiffs presented with a settlement offer from only one of several defendants by undermining the public policy of rule 408 of encouraging settlements.⁷⁶

While various jurisdictions have differed on the extent to which evidence of settlement should be withheld, those jurisdictions withholding such evidence have generally been in agreement with the rationale for withholding evidence.⁷⁷ The rationale has focused on both prejudice to the parties and the effect on settlements.⁷⁸ In *DeLude v. Rimek*,⁷⁹ an Illi-

was mislead and thought defendant was the only possible source for compensating plaintiff's injuries. *Id.* at 195.

73. *Id.*

74. *Id.*; see also *Belton v. Fibreboard Corp.*, 724 F.2d 500 (5th Cir. 1984). In *Belton*, the court of appeals held that the trial court violated rule 408 by directing the jury to consider plaintiff's settlements with fifteen co-defendants as part of the proof of the amount of plaintiff's claim. *Id.* at 505.

75. 539 F. Supp. at 195; see also *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161, 166 (5th Cir. 1983) (trial court erred in admitting covenant not to sue because jury could have perceived that joint tortfeasor who paid plaintiff substantial settlement was liable).

76. 539 F. Supp. at 197-98. The advisory committee noted that a consistently impressive ground to exclude evidence of a compromise is promotion of public policy favoring the compromise and settlement of disputes. FED. R. EVID. 408 advisory committee's note.

77. See, e.g., *Luth v. Rogers and Babler Constr.*, 507 P.2d 761 (Alaska 1973); *Egurrola v. Szychowski*, 95 Ariz. 194, 388 P.2d 242 (1964); *DeLude v. Rimek*, 351 Ill. App. 466, 115 N.E.2d 561 (1953); *Brooks v. Daley*, 242 Md. 185, 218 A.2d 184 (1966); *Brewer v. Payless Stations, Inc.*, 412 Mich. 673, 316 N.W.2d 702 (1982); *Azure v. City of Billings*, 182 Mont. 234, 596 P.2d 460 (1979). For a discussion of the rationale of the courts that have ruled in this manner, see *infra* notes 78-101 and accompanying text.

78. See, e.g., *Luth v. Rogers and Babler Constr.*, 507 P.2d 761, 768 (Alaska 1973) (jury's knowledge of settlement and its amount may prejudice plaintiff and unreleased defendant and discourage extra-judicial settlements); *DeLude v. Rimek*, 351 Ill. App. 466, 474, 115 N.E.2d 561, 565 (1953) (introducing covenant not to sue is potentially prejudicial to plaintiffs and tends to discourage settlements); *Brewer v. Payless Stations, Inc.*, 412 Mich. 673, 679, 316 N.W.2d 702, 705 (1982) ("uncertainty of juror reaction to the fact of an indemnity release is considered as a foreseeable deterrent to settlements between plaintiffs and codefendants"); *Azure v. City of Billings*, 182 Mont. 234, 244, 596 P.2d 460, 466 (1979) (plaintiff prejudiced by court's instruction that he had settled with codefendant).

79. 351 Ill. App. 466, 115 N.E.2d 561 (1953). In *DeLude*, the plaintiffs sustained injuries when the car in which they were passengers collided with a car driven by an intoxicated driver. *Id.* at 467-68, 115 N.E.2d at 562. Plaintiffs sued

nois appellate court held that introducing evidence of a covenant not to sue was potentially prejudicial to a plaintiff because a jury may consider the covenant as conclusive proof that the covenantee is the responsible party and the remaining defendants should be exculpated.⁸⁰ Moreover, the *DeLude* court reasoned that admitting evidence of a covenant not to sue would tend to discourage settlements because of the potential prejudice to the plaintiff.⁸¹

In *Luth v. Rogers and Babler Construction Co.*,⁸² the Supreme Court of Alaska affirmed the trial court's decision prohibiting the defendant from introducing evidence of a covenant not to sue for the purpose of impeaching the plaintiff's testimony that he had never asserted any claims against another person as a result of his injuries.⁸³ Plaintiffs traveling in one vehicle were injured when their car collided with another vehicle.⁸⁴ The driver of the other automobile did not own the vehicle he was driving.⁸⁵ Plaintiffs did not sue the driver of the other automobile, but instead sued both the automobile owner and the driver's employer.⁸⁶ Prior to trial, plaintiffs executed a covenant not to sue for a consideration of \$3500 from the automobile owner.⁸⁷ The trial court had held that the covenant was irrelevant since the issue was whether the defendant employer was vicariously liable under the doctrine of *respondeat supe-*

both the intoxicated driver and the owners of an establishment that allegedly sold liquor to the driver. *Id.* Subsequently, however, plaintiffs gave the driver a covenant not to sue in consideration for payments made to plaintiffs by the driver. *Id.*

80. *Id.* at 473, 115 N.E.2d at 565. The court stated:

[T]here is always an effort on the part of the defense to put the covenant before the jury and to make the most of it during the course of the trial. In the instant case, time and again, and with more repetition than was necessary to preserve their record, defendants stressed their objections to evidence of damages, on the ground that the covenantee had paid such damages.

Id.

81. *Id.* at 474, 115 N.E. 2d at 565. In addition, the *DeLude* court held that it was the function of the court to reduce the jury's verdict by the consideration received by the plaintiff for a covenant not to sue. *Id.* For a discussion of the "court rule," see *supra* note 38 and accompanying text.

In *Burger v. Van Severen*, the Second District Appellate Court of Illinois followed *DeLude* in reversing the trial court's decision permitting evidence of an \$11,000 settlement to be introduced. 39 Ill. App. 2d 205, 214, 188 N.E.2d 373, 377 (1963). Similarly, in *Egurrola v. Szychowski*, the Supreme Court of Arizona followed *DeLude* and held that plaintiffs improperly introduced evidence of the covenant not to sue they had given to one of the defendants. 95 Ariz. 194, 198-99, 388 P.2d 242, 244-45 (1964).

82. 507 P.2d 761 (Alaska 1973). For the facts of *Luth*, see *infra* text accompanying notes 84-87.

83. 507 P.2d at 766.

84. *Id.* at 762.

85. *Id.*

86. *Id.*

87. *Id.* Plaintiff had executed the covenant not to sue before bringing suit against Rogers and Babler Construction Co. *Id.*

rior.⁸⁸ More importantly, the court stated that allowing the jury to have knowledge of a covenant can result in prejudice to both plaintiff and defendant.⁸⁹ The court noted that the unreleased defendant could be prejudiced if the jury imputed his negligence by what appeared to be a virtual admission of negligence by the covenantee.⁹⁰ Conversely, the court noted that the plaintiff risks prejudice if the jury views the settlement as evidence of the covenantee's total responsibility for the injury and the defendant's freedom from fault.⁹¹

88. *Id.* Although Jack was returning home from his work site, there was a question as to whether his commute was within the scope of his employment since he received additional remuneration for his daily commute. *Id.* at 762-63. The trial court granted plaintiffs' motion for a directed verdict holding that as a matter of law, Rogers was liable under the doctrine of *respondeat superior*. *Id.* at 762. The Supreme Court of Alaska reversed the lower court and remanded for a new trial, noting that scope of employment questions must be resolved by the jury when conflicting inferences can be drawn from undisputed facts. *Id.* at 764.

89. *Id.* at 768. The court concluded that the "court rule" enunciated in *DeLude* was the preferred method of deducting the amount a plaintiff has received as consideration for a covenant. *Id.* For a statement of the court's holding in *DeLude*, see *supra* note 38 and accompanying text.

90. 507 P.2d at 768; see also *Brooks v. Daley*, 242 Md. 185, 218 A.2d 184 (1966). In *Brooks*, the appellate court affirmed the trial court's decision prohibiting evidence of the plaintiff's settlement with a tortfeasor impleaded by the defendant as a third-party defendant. *Id.* at 189, 193, 218 A.2d at 186, 188. The appellate court stated:

Although evidence of a settlement with the third-party defendant would have provided an additional means for attacking [the plaintiff's] credibility, the trial court was justified in excluding any reference to a settlement because of the confusion it could have caused the jury in assessing damages. There existed, moreover, a very real possibility that the settlement could have been misconstrued as an admission of liability by [the third-party defendant].

Id. at 194, 218 A.2d at 189.

91. 507 P.2d at 768. Mere knowledge of a settlement may not reflect the facts which led the plaintiff to settle for a specified amount. See, e.g., *Azure v. City of Billings*, 182 Mont. 234, 596 P.2d 460 (1979). In *Azure*, the plaintiff settled with one defendant for \$10,000, the limits of his insurance policy, yet sought approximately one million dollars from the city of Billings for failing to render prompt medical treatment. *Id.* at 237-38, 596 P.2d at 467. Although the trial court had granted plaintiff's motion *in limine* to exclude all evidence relative to the settlement, the court instructed the jury that plaintiff had settled with another party for \$10,000 and that if the jury found for plaintiff, it should deduct \$10,000 from the damage award. *Id.* at 244, 596 P.2d at 466. Criticizing the lower court's failure to avoid prejudice to the plaintiff, the appellate court reversed, noting that the court's instruction had accomplished for the defendant that which the court had ruled improper. *Id.* at 246, 596 P.2d at 467. The court further stated:

From a practical standpoint it is natural that in a situation such as this a jury will be curious as to why all potential defendants are not before the court where evidence is presented that more than one person may be responsible for the resulting injuries Nonetheless, the trial court can tell the jury . . . that the court will take care of these factors at a later time after the jury has reached its verdict.

Id. at 246-47, 596 P.2d at 467. However, the court conceded that there are occasions when the jury should be informed of the amount of settlement. *Id.* at 247,

In one of the most recent decisions expressing the view that evidence of settlement should be withheld from a jury, the Supreme Court of Michigan, in *Brewer v. Payless Stations, Inc.*,⁹² reinforced the traditional rationales for withholding such evidence.⁹³ The *Brewer* court reasoned that informing the jury of the existence and amount of the plaintiff's settlement with a defendant prejudiced both the plaintiff and the remaining defendant.⁹⁴ The court noted that if the jury views a settlement as an admission of liability by the settling tortfeasor, the jury may conclude that the responsible party has settled.⁹⁵ Conversely, the court indicated that a settlement with one defendant could suggest liability of the non-settling defendant.⁹⁶ Moreover, the court explained that how the jury views the *amount* of the settlement received by the plaintiff could prejudice either the plaintiff or the defendant.⁹⁷ The court noted that if a settlement is large, this might suggest a higher value for the jury's verdict, and if the amount is small, the jury may attempt to compensate by a higher award.⁹⁸ Conversely, the court noted that a large settlement may convince the jury that the plaintiff has received adequate compensation, and a small settlement may create the impression that the total value of the plaintiff's claim is small.⁹⁹ The court emphasized that juries are subject to suggestion, and that to burden them with facts that have no bearing on the liability of the non-settling defendant is unneces-

596 P.2d at 467. One such occasion occurs when there is a factual question regarding a settlement. *Id.* Another example occurs where there must be reapportionment of damages among several tortfeasors who have been held liable at a separate trial. *Id.*

When the issue of liability is closely contested, a jury's verdict is not infrequently the result of a compromise of varying views. *Powers v. Temple*, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967). Jurors may agree to a verdict for the defendant upon concluding that the plaintiff has already been substantially compensated for his injuries. *Id.*

92. 412 Mich. 673, 316 N.W.2d 702 (1982). In *Brewer*, the plaintiff suffered injuries in an automobile accident which occurred when an automobile with unknown occupants drove recklessly from a Payless Gas Station in the direction of plaintiff's vehicle, causing plaintiff's vehicle to swerve dangerously into traffic where it was struck by an oncoming automobile. *Id.* at 674, 316 N.W.2d at 703. The collision caused the fuel tank of plaintiff's vehicle to explode and plaintiff was severely burned. *Id.* Plaintiff sued Payless Stations, alleging negligent station design, and General Motors, alleging negligent design of the fuel tank. *Id.* Prior to trial, plaintiff settled his claim against General Motors in return for \$150,000. *Id.*

93. *Id.* at 677-78, 316 N.W.2d at 704-05.

94. *Id.* at 678, 316 N.W.2d at 705.

95. *Id.* at 677, 316 N.W.2d at 704.

96. *Id.* at 678, 316 N.W.2d at 705.

97. *Id.* The court stated that jury "rule is a two-edged sword. It cuts both ways. Some of the plaintiff's arguments . . . could be used by a defendant." *Id.*

98. *Id.*

99. *Id.* "The amount of the settlement, if large might tend to suggest a higher value of a claim. If small, the jury might tend to 'make it up' by a higher verdict as to the non-settling tortfeasor." *Id.*

sary.¹⁰⁰ Finally, the court noted that the jury need not know the amount of the settlement since the court will make the appropriate deduction from the jury's damages award.¹⁰¹

B. *A Moderate Approach: Informing the Jury of a Settlement, But Withholding Evidence of Amount*

Some jurisdictions have chosen an intermediate approach to the issue of the extent of a jury's knowledge of a plaintiff's out-of-court settlement with one or more joint tortfeasors.¹⁰² That is, these courts inform the jury of the fact of settlement, but not the amount paid.¹⁰³ Courts espousing this view assert that advising the jury of a settlement avoids prejudice that can occur if jurors speculate about absent tortfeasors.¹⁰⁴

In *Theobold v. Angelos*,¹⁰⁵ the Supreme Court of New Jersey concluded that it is not only wise psychologically, but fair to inform the jury of the fact of settlement because speculation as to why some defendants are absent is avoided.¹⁰⁶ In *Theobold*, defendant Anderson lost control of his automobile, which came to rest partly on the plaintiff Theobold's property.¹⁰⁷ Theobold, his son-in-law Golden, and a police car driven by Officer Angelos arrived at the scene of the accident.¹⁰⁸ Golden had been standing near the police car and Theobold had been standing between Anderson's vehicle and the police car when defendant Conaty crashed into the police car pinning Theobold's legs between the two vehicles.¹⁰⁹ Theobold, severely injured, and Golden, slightly injured, sued Anderson, Conaty, Officer Angelos and the township for damages

100. *Id.* at 676, 316 N.W.2d at 705. Juries are subject to confusion from the mass of probative evidence and its relationship to the instructions from the court. *Id.*

101. *Id.* The *Brewer* court, *per curiam*, adopted the "court rule" for computing damages when it held that the jury should not be informed of a prior settlement. *Id.* Interestingly, the court characterized its adoption of the "court rule" as a "matter of policy." *Id.* at 675, 316 N.W.2d at 703. For a discussion of the "court rule" for computing damages, see *supra* note 38 and accompanying text.

102. See, e.g., *Greenemeier v. Spencer*, 719 P.2d 710 (Colo. 1986); *Theobold v. Angelos*, 40 N.J. 295, 191 A.2d 465 (1963). For a discussion of these cases, see *infra* notes 105-28 and accompanying text.

103. See, e.g., *Greenemeier v. Spencer*, 719 P.2d 710, 714 (Colo. 1986) ("We hold that the fact of settlement, but not the amount paid, should be brought to the jury's attention, absent special circumstances."); *Theobold v. Angelos*, 40 N.J. 295, 304, 191 A.2d 465, 469 (1963) (fact of settlement, but not amount paid, is generally brought to attention of jury at trial).

104. *Greenemeier v. Spencer*, 719 P.2d 710, 715 (Colo. 1986); see also *Theobold v. Angelos*, 40 N.J. 295, 304, 191 A.2d 465, 469 (1963) ("When the jury has such knowledge, speculation is avoided as to the reason for the absence from the proceedings of an additional potentially liable person.").

105. 40 N.J. 295, 191 A.2d 465 (1963).

106. *Id.* at 304, 191 A.2d at 469.

107. *Id.* at 298, 191 A.2d at 466.

108. *Id.*

109. *Id.*

for their injuries and losses.¹¹⁰ Theobold settled his claim against Conaty and Anderson for \$88,500 and \$1,500 respectively.¹¹¹ Golden settled with Conaty for \$1,500 and with Anderson for \$500.¹¹² In the trial against the remaining defendants, Angelos and the township, the court referred to the settlements with Conaty and Anderson in general but ambiguous terms and failed to inform the jurors that their verdict was to represent full compensation for all the plaintiffs' damages arising from the accident.¹¹³ As a result of this instruction, the jury awarded a \$65,000 judgment to Theobold and a \$1,000 judgment to Golden.¹¹⁴

On appeal, the Supreme Court of New Jersey stated that if the court informs the jury of the settlement, the court must also give clear instructions to assure that the jurors appreciate the significance of the settlement.¹¹⁵ The court noted that the jury's primary obligation is to decide whether the non-settling defendant is liable for the plaintiff's inju-

110. *Id.*

111. *Id.*

112. *Id.* at 298-99, 191 A.2d at 466.

113. *Id.* at 305, 191 A.2d at 470. The trial court had instructed in part:

This case originally had two other defendants. You have heard, of course, throughout the case that both of these defendants, namely, Francis Conaty and James Anderson have already settled their cases with both of these plaintiffs. The Court, of course, will not tell you the amount of the settlement that was made because you are to figure this case, if you feel that these plaintiffs are entitled to a judgment, on what each of the plaintiffs' verdicts should be, assuming of course that you find that they are entitled to a verdict against the two present defendants, namely Leon Angelos and Cherry Hill Township.

Id. at 306, 191 A.2d at 470.

114. *Id.* at 299, 191 A.2d at 467.

115. *Id.* at 304, 191 A.2d at 469. The high court noted that at no point had the trial court clearly charged the jurors that their verdict should fully compensate the plaintiff for all of his damages arising from the accident. *Id.* at 307-08, 191 A.2d at 471. Thus, the court suggested that a trial court must carefully instruct the jury as to their precise role in the assessment of damages, stating:

First, the jurors must decide on the evidence whether the defendant on trial was guilty of negligence which was solely or partly responsible for the incident which produced the plaintiff's injuries and pecuniary losses. After reaching an affirmative conclusion on that subject, they should then pass to a determination of the amount of compensation to be awarded. Here they have to realize that their duty is to give to the plaintiff the total sum which represents reasonable compensation for his injuries and losses. . . . The computation must be made without regard to . . . the total number of persons involved in the incident which caused the damages, including those who have made settlements with plaintiff, and without any deduction based upon what the jurors think plaintiff may or should have received in those settlements. . . . A properly compensatory verdict can be expected once the trial court, by its instructions, engenders in the minds of the jurors an appreciation that injustice and inadequate recovery will fall upon the plaintiff if, on the basis of some effort at allocation among the remaining defendants and the settlers, they lower the total sum he is entitled to receive as measured by the elements of damage described above.

Id. at 304-05, 191 A.2d at 469-70.

ries.¹¹⁶ The court noted further that once the defendant is found liable, the jury must determine the amount of compensation to be awarded.¹¹⁷ At this point, the court emphasized, the jurors must be instructed to fix damages in an amount representing total compensation for all of the plaintiff's injuries and losses.¹¹⁸ The court emphasized that the jury must be instructed to award damages without regard to the number of defendants, including those defendants who may have settled, and without reducing their judgment by the settlement amount.¹¹⁹ The court further reasoned that thorough instructions ensure an adequate recovery by admonishing the jury that by apportioning damages among the non-settling and the settling defendants, the plaintiff may receive less than full compensation for the damages sustained.¹²⁰

More recently, in *Greenemeier v. Spencer*¹²¹ the Colorado Supreme

116. *Id.* at 304, 191 A.2d at 469.

117. *Id.*

118. *Id.* This sum may include compensation for bodily injuries, for pain and suffering resulting from such injuries in the past, present and future, for the effect of the injuries upon the plaintiff's health, and for any permanent disability which has resulted or will result. *Id.* at 304, 191 A.2d at 469-70. In addition, the sum must include all expenses related to plaintiff's efforts to cure or alleviate his injuries and all loss of wages resulting from his inability to continue in his usual occupation. *Id.* at 304, 191 A.2d at 470.

In *Yardley v. Rucker Bros. Trucking*, the Court of Appeals of Oregon concluded that the trial court had not met the required standard for instructions regarding a settlement. 42 Or. App. 239, 244, 600 P.2d 485, 488 (1979). The trial court had instructed the jury to "arrive at the amount of such damages without regard to any other defendants formerly in the case." *Id.* The appellate court held that the trial court erred in failing to unequivocally instruct the jury to disregard the settlement and return a verdict for the full amount of the plaintiff's damages. *Id.* In addition, the trial court erred by not informing the jury that the court would deduct the settlement amount from the jury's damages award. *Id.*

Although the *Yardley* court adopted the court rule as the method for calculating damages, the court did not present a firm rule regarding the admissibility of evidence of a settlement at trial. *Id.* at 242, 600 P.2d at 487. The court stated that either evidence of a settlement is not admissible, or under appropriate circumstances, such as to explain the absence of likely defendants, evidence of a settlement may be admitted. *Id.* at 243, 600 P.2d at 487. However, the court noted that evidence of the amount of a settlement is inadmissible before a jury. *Id.* at 243, 600 P.2d at 488.

119. *Theobald*, 40 N.J. at 305, 191 A.2d at 470. The court explained that the jury "should treat the matter as if no one other than [the] defendant were ever involved in the accident and as if their only problem were to decide on the monetary sum." *Id.*

120. *Id.* In *Theobald*, the Supreme Court of New Jersey suggested that the jurors may have understood that they were to award damages representing the share to be paid by the remaining defendants on trial. *Id.* at 308, 191 A.2d at 471. The jury returned a verdict of \$65,000 and the plaintiff had settled with two other defendants for \$90,000 total. *Id.* at 298-99, 191 A.2d at 466-67. Thus, the court stressed that the trial court must assure the jury that the court will apportion the compensation amount as required by law. *Id.* at 305, 191 A.2d at 470.

121. 719 P.2d 710 (Colo. 1986).

Court adopted the intermediate approach espoused by the *Theobald* court as most conducive to a verdict consistent with the evidence.¹²² As in *Theobald*, the *Greenemeier* court stressed the importance of clear jury instructions to assure that the jury returns an award that fully compensates the plaintiff.¹²³ Contrary to the reasoning of those courts espousing the view that a jury should not be informed of a settlement, the *Greenemeier* court asserted that informing the jury of a settlement minimizes the risk that the jury will impute liability or lack of liability to the defendant simply because a defendant appears to have admitted responsibility for plaintiff's damages by settling out of court.¹²⁴ The court explained that informing the jury about the interrelation of the claims against settling and non-settling defendants avoids prejudicial inferences that may result when jurors speculate about the absence of potential defendants.¹²⁵

The Colorado Supreme Court concluded, however, that the jury should not be informed of the amount paid in a settlement to minimize the danger that the jury will reduce or increase the plaintiff's award based on a belief that the plaintiff was overcompensated or undercompensated by the settlement.¹²⁶ Furthermore, the court cautioned that a liberal rule which permits a jury to learn of a settlement cannot be absolute.¹²⁷ Instead, the court noted that in special circumstances, the trial

122. *Id.* at 715. The *Greenemeier* court noted that a jury will return an accurate verdict when the jurors know that the verdict will be apportioned among the defendants and settling parties as the law requires. *Id.*

In *Greenemeier*, the plaintiff suffered an eye injury when the defendants Spencer and Sacco fired BB guns in plaintiff's direction. *Id.* at 711. Before trial, *Greenemeier* settled his claim against Sacco for \$100,000. *Id.* at 712. At trial, the plaintiff requested that the jury be informed of the settlement and amount, and the defendant Spencer requested that the jury be told of the settlement only. *Id.* The trial judge refused both requests and disclosed nothing about the settlement to the jury. *Id.*

123. *Id.* at 714-15. The court stated:

The jury must also be directed that if it concludes that the defendant is liable, it must return an award that fully compensates the plaintiff for all of his injuries without regard to the fact that the plaintiff may have received compensation from others as a result of the settlement.

Id.

124. *Id.* at 715. The court stated:

By providing the jury with general information about the interrelation of the claims against settling and non-settling parties, the *Theobald v. Angelos* approach also serves to minimize any risk that the jury will impute liability, or lack of liability, to the defendant simply by virtue of the fact that some other potential defendant has "admitted" liability through settlement.

Id.

125. *Id.*

126. *Id.* The court noted that "the jury is not even informed of the amount of settlement and thus cannot use that amount as a yardstick with which to measure the damages to be assessed against the defendant." *Id.*

127. *Id.* The court noted:

Although the foregoing considerations persuade us that in the

court has discretion to vary from the rule when such variation is necessary to promote a non-prejudicial verdict.¹²⁸

C. *The Minority View: Permitting the Jury to Hear Evidence Concerning Settlement and Amount*

A minority of state courts have adopted the view that the jury should be informed not only of the settlement, but also of the amount of consideration given in exchange for plaintiff's covenant not to sue.¹²⁹ In *Steele v. Hash*,¹³⁰ a California appellate court concluded that a jury had the right to know of a settlement and its amount.¹³¹ Following the "jury rule" for calculating damages,¹³² the trial court in *Steele* instructed the jurors to deduct the settlement amount from their verdict if they found the non-settling defendant liable.¹³³ On appeal, the court upheld the

usual case a jury should be advised of the fact of settlement, but not the amount, the many and varied circumstances in which the issue may arise caution against adoption of an absolute rule. The trial court should be allowed discretion to vary from this approach where special circumstances convince the court that such variation will best promote a verdict based on the facts and the applicable law. This will give ample scope to the trial courts to evaluate the complex human and legal factors involved in assessing the likely effects of disclosure of settlements and will promote verdicts based only on legally appropriate considerations.

Id. at 715-16.

128. *Id.* Although the court failed to elaborate on the issue of "special circumstances," the court stated that to facilitate appellate review, the trial court should articulate precisely what prompted its deviation from the normal rule. *Id.* at 716; see also *Degen v. Bayman*, 86 S.D. 598, 200 N.W.2d 134 (1972). In *Degen*, the Supreme Court of South Dakota held that whether a jury should be informed of a prior settlement should be left to the discretion of the trial court. *Id.* at 607, 200 N.W.2d at 139. The court said "[w]e can visualize no circumstances where the amount involved in a release or covenant need be disclosed to the jury . . . unless it clearly appears that a fair trial has been jeopardized." *Id.*

129. See, e.g., *Anderson v. Kemp*, 279 Ala. 321, 184 So. 2d 832 (1966); *Steele v. Hash*, 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963); *Haley v. Byers Transp. Co.*, 394 S.W.2d 412 (Mo. 1965).

130. 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963). In *Steele*, defendant accidentally drove his vehicle into another vehicle killing James Steele, a passenger in the other vehicle. *Id.* at 2, 27 Cal. Rptr. at 853. Clyde Steele, as administrator of his son's estate, sued both drivers for wrongful death. *Id.* Prior to trial, Steele settled his claim against one driver for \$2,500 and proceeded to trial against the remaining defendant. *Id.* The trial court informed the jury of both the settlement and amount and asked the jurors to deduct \$2,500 from their total judgment, should they find for the plaintiff. *Id.* at 2, 27 Cal. Rptr. at 854. The jury returned a verdict in favor of the defendant. *Id.* at 2, 27 Cal. Rptr. at 853.

131. *Id.* at 4, 27 Cal. Rptr. at 855. The appellate court noted that the plaintiff had not found any California authority "indicating that a trial court is empowered to withhold certain evidence from the jury, allow them to arrive at a verdict, and thereafter reduce that verdict on the basis of evidence which the jury was not permitted to consider." *Id.* at 3-4, 27 Cal. Rptr. at 855.

132. For a discussion of the "court rule" and "jury rule" for calculating damages, see *supra* note 38.

133. *Id.* at 2, 27 Cal. Rptr. at 854.

plaintiff's verdict, noting that the trial court had wisely instructed the jury to resolve the issue of defendant's liability prior to determining the total amount of damages.¹³⁴

Similarly, in *Haley v. Byers Transportation Co.*,¹³⁵ the Missouri Supreme Court followed the jury rule and permitted the jury to hear evidence concerning the settlement and its amount.¹³⁶ The court carefully instructed the jurors to determine the total amount of the plaintiff's damages and then deduct the amount of the settlement from the total damages.¹³⁷ Because the Missouri courts follow the jury rule, which requires the jury to make the deduction, the *Haley* court had no occasion to discuss its reasoning for informing the jury of a settlement and amount.¹³⁸

IV. ANALYSIS

Although the various jurisdictions present three distinct approaches to the issue of the extent of a jury's knowledge concerning settlement, the various courts all select an approach which they believe avoids prejudice to both plaintiff and defendant and produces a fair verdict.¹³⁹ While the goals of each approach are consistent, how courts view the role and competence of the jury serves to determine which method a

134. *Id.* at 3, 27 Cal. Rptr. at 854.

135. 394 S.W.2d 412 (Mo. 1965).

136. *Id.* at 415. In *Haley*, the plaintiff was permanently injured in a collision between plaintiff's automobile and two tractor-trailers. *Id.* at 414. Plaintiff settled his claim against one defendant for \$80,000 and proceeded to trial against the remaining tortfeasor. *Id.*

137. *Id.* at 414-15. The trial court partially instructed the jury:

If you find in favor of the plaintiff on his petition, then you must award him such sum as you believe will fairly and justly compensate him for such damages as you believe plaintiff sustained in the past and is reasonably certain to sustain in the future as a direct result of the negligence, if any, of the defendants.

Id. at 414.

138. *Id.* at 415; see also *Anderson v. Kemp*, 279 Ala. 321, 184 So. 2d 832 (1966). In *Anderson*, the court also applied the "jury rule," informing the jury of the plaintiff's settlement with one defendant as well as the amount of the settlement. *Id.* at 324, 184 So. 2d at 835. The court stated:

It is equally well settled, however, that a person injured by joint tortfeasors may accept partial satisfaction and release one or more pro tanto and proceed against the others. However, the tortfeasors not so released may plead the release as a bar to that amount paid by the released tortfeasor or may place it in evidence showing payment for the injury up to the amount shown in the release.

Id. at 323, 184 So. 2d at 834 (citing *Steenhuis v. Holland*, 217 Ala. 105, 115 So. 2 (1927); *Wright v. McCord*, 205 Ala. 122, 88 So. 150 (1920)).

139. See, e.g., *Luth*, 507 P.2d at 768 (withholding information from jury regarding settlement avoids prejudice and encourages extra-judicial settlements); *Steele*, 212 Cal. App. 2d at 4, 27 Cal. Rptr. at 855 (jury has right to know of settlement paid by tortfeasor); *Greenemeier*, 719 P.2d at 715 (advising jury of fact of settlement avoids prejudicial inferences).

court will follow.¹⁴⁰

A number of commentators have addressed the issue of jury competence.¹⁴¹ One noted researcher, Harry Kalven, commented that a jury can operate effectively by collective recall.¹⁴² From an extensive survey of 8000 jury trials, Kalven concluded that the jury understands its duties sufficiently enough to produce a just result and that its intellectual incompetence has been vastly exaggerated.¹⁴³ In a jurisdiction that chooses to inform the jury of both the existence and the amount of the settlement, while allowing the jury to perform the settlement deduction, courts must assume a competence of the jury which Kalven discussed.¹⁴⁴ For example, in *Steele*, the California District Court of Appeal, presuming that the jury was competent to determine the defendant's liability and the amount of plaintiff's damages, held that the jury had a right to know of a settlement and its amount.¹⁴⁵

Not all courts and commentators have expressed such confidence in

140. See, e.g., *Greenemeier*, 719 P.2d at 716. Upon deciding that juries should be informed of a settlement but not the amount paid, the court explained that this method was "in keeping with the confidence that we justifiably repose in juries to resolve serious matters in a responsible, fair and impartial manner, adhering to the instructions given by the court and uninfluenced by extraneous considerations." *Id.*

141. See, e.g., Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 LAW AND HUM. BEHAV. 83, 86 (1985) (analysis of simulated jury deliberations indicates jurors focus group decision-making on alternative notions of "what really happened"); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1066 (1964) (intellectual incompetence not a problem in jury trials) [hereinafter *Kalven, Dignity*]; Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 165 (1958) (jury may discount damages because of doubt of liability or increase damages resulting from their belief as to degree of defendant's fault) [hereinafter *Kalven, Damage Award*]; Vinson, *Litigation: An Introduction to the Application of Behavioral Science*, 15 CONN. L. REV. 767, 786 (1983) (juror attempts to fulfill his own needs in reaching decision) [hereinafter *Vinson, Litigation*]; Vinson, *Psychological Anchors: Influencing the Jury*, 8 LITIGATION 20, 21 (Winter 1982) (jurors reason for fundamental premises to which they fit facts as received) [hereinafter *Vinson, Psychological Anchors*].

142. Kalven, *Dignity*, *supra* note 141, at 1067. Kalven's study of jury behavior was an empirical research project of the University of Chicago Law School. *Id.* at 1056. From a survey of 600 judges and 8000 civil jury trials, Kalven and his colleagues analyzed the actual jury verdict, a hypothetical verdict from the court, and explanations from the judge if he disagreed with the jury's verdict. *Id.* at 1063.

143. *Id.* at 1067.

144. See, e.g., *Steele*, 212 Cal. App. 2d at 2, 27 Cal. Rptr. at 854. Courts such as *Steele* espouse the "jury method" of calculating damages. The court instructed the jury as follows: "'You are further instructed that a co-defendant has paid the plaintiff two thousand dollars in settlement. This amount should be deducted by you from the verdict, if you should find for the plaintiff.'" *Id.* at 2, 27 Cal. Rptr. at 854. For further explanation of the "jury method" and "court method," see *supra* note 38.

145. 212 Cal. App. 2d at 4, 27 Cal. Rptr. at 855. For a discussion of *Steele*, see *supra* notes 130-34 and accompanying text.

the ability of jurors.¹⁴⁶ As behaviorist Donald Vinson has observed, jurors are not always attentive during trial and even when they are especially interested in the trial, jurors cannot maintain a high-level attention span for more than twenty minutes.¹⁴⁷ More specifically, Harry Kalven observed that when a jury must compute plaintiff's damages, the court's opportunities for control of the jury is limited.¹⁴⁸ The court's control is usually limited by excluding evidence or withdrawing a prejudicial item from the jury.¹⁴⁹ Kalven recognized that non-disclosure of some information raises policy questions.¹⁵⁰ Examples of such information include the fact that attorney's fees are not part of plaintiff's damages, interest is not awarded from the time of injury, and plaintiff's award is not subject to federal income tax.¹⁵¹ Kalven noted that his study suggests that disclosure of such information would sensitize the jury and cause the jurors to reach a different decision than they would have without the information.¹⁵² Additionally, Kalven's study indicated that even though a jury has been instructed to award full damages proved if they find the defendant liable, jurors may discount damages because they doubt defendant's liability.¹⁵³ Kalven reasoned that a discount can result where someone else is at fault and the jury believes the defendant should not bear the entire burden.¹⁵⁴ Since Kalven's jury research indi-

146. See, e.g., Kalven, *Damage Award*, *supra* note 141, at 168 (jurors may impute negligence by discounting defendant's burden because he was not totally responsible); Vinson, *Litigation*, *supra* note 141, at 769 (jurors may fail to hear important arguments because of lack of attention).

147. Vinson, *Litigation*, *supra* note 141, at 769. Vinson indicated that jurors possess a pre-existing cognitive structure and have a basic need to reach a verdict expeditiously. *Id.* at 778. Faced with the task of examining the evidence and deciding a case, jurors, as Vinson observed, employ four coping behaviors to achieve and maintain a cognitively consonant world: (1) pretend unwelcome information is nonexistent, (2) distort information until it is consonant with their basic values, (3) minimize the importance of evidence that contradicts their basic values, and (4) avoid any encounter with facts contrary to their decision. Vinson, *Psychological Anchors*, *supra* note 141, at 21. Vinson advises attorneys that to increase their chance of a favorable verdict, they must anticipate which juror's beliefs are consistent and which conflict with the possible views of the case and adopt the view that is closely linked to the jurors' attitudes and beliefs. *Id.* at 22.

148. Kalven, *Damage Award*, *supra* note 141, at 160. Kalven noted that judge's instructions to the jury convey headings under which the jury may award damages. *Id.* Because these headings are broad, Kalven observed that the chief message of the instructions is to tell the jurors how free they are in determining damages. *Id.*

149. *Id.* Kalven indicated that the judge has discretion to set aside excessive or inadequate verdicts. *Id.*

150. *Id.* at 163.

151. *Id.*

152. *Id.*

153. *Id.* at 165-66.

154. *Id.* at 167. Kalven explained that the jury reacts to rules against imputing negligence. *Id.* at 168. "It does so not by a logic directly challenging the rule but by discounting defendant's burden because he was not totally responsible." *Id.*

cates that jurors may use certain evidence in a manner that prejudices either the plaintiff or defendant, courts that limit or exclude evidence of a settlement and amount paid may be justified in their action.¹⁵⁵

Most jurisdictions recognize the problem that providing the jurors with more information than is necessary to decide the issues of liability and damages may lead to confusion and improper inferences that may prejudice plaintiff and defendant.¹⁵⁶ As a result, most jurisdictions will limit to some extent what information is disclosed to the jury.¹⁵⁷ Courts such as *Theobald* and *Greenemeier* prohibit the introduction of evidence concerning amount of settlement, while allowing the jury to learn of the existence of a settlement.¹⁵⁸ These courts believe that informing the jury of the *amount* of settlement *increases* the potential for prejudice while informing them of the *existence* of the settlement *reduces* prejudicial inferences.¹⁵⁹ The Colorado Supreme Court in *Greenemeier* noted that providing general information about the settlement minimizes "any risks that the jury will impute liability, or lack of liability, to the defendant simply by virtue of the fact that some other potential defendant has 'admitted' liability through settlement."¹⁶⁰ The *Theobald* and *Greenemeier* courts indicated that informing the jury of a settlement avoids speculation about the absent defendant, thereby reducing prejudicial inferences¹⁶¹ and providing a fair environment for the plaintiff.¹⁶²

The *Brewer* and *Luth* courts establish a stricter approach which prohibits any reference to the jury as to the existence *or* amount of settlement.¹⁶³ Both courts observed that burdening the jury with extra facts about a settlement may confuse the jury and prejudice plaintiff or defendant.¹⁶⁴ Evidence of settlement may confuse the jurors because they

155. For a general discussion of how jurors react to evidence that impacts on their decision regarding a plaintiff's damages award, see *supra* notes 152-54 and accompanying text.

156. See *Brewer*, 412 Mich. at 678-79, 316 N.W. 2d at 705; see also *Greenemeier*, 719 P.2d at 715.

157. See, e.g., *Luth*, 507 P.2d at 768 (neither settlement nor amount admissible); *Greenemeier*, 719 P.2d at 714 (fact of settlement admissible while amount paid not admissible); *Brewer*, 412 Mich. at 679, 316 N.W.2d at 705 (neither settlement nor amount admissible); *Azure v. City of Billings*, 182 Mont. 234, 244-45, 596 P.2d 460, 466 (1979) (same); *Theobald*, 40 N.J. at 304, 191 A.2d at 469 (fact of settlement admissible while amount paid not admissible).

158. *Greenemeier*, 719 P.2d at 715; *Theobald*, 40 N.J. at 304, 191 A.2d at 469.

159. *Greenemeier*, 719 P.2d at 715; *Theobald*, 40 N.J. at 304, 191 A.2d at 469.

160. *Greenemeier*, 719 P.2d at 715.

161. *Id.*

162. *Theobald*, 40 N.J. at 304, 191 A.2d at 469.

163. *Luth*, 507 P.2d at 768; *Brewer*, 412 Mich. at 679, 316 N.W.2d at 705.

164. *Luth*, 507 P.2d at 768; *Brewer*, 412 Mich. at 677-79, 316 N.W.2d at 704-05. Concluding that the jury is not to be informed of the existence or amount of settlement, the *Brewer* court observed:

It is true that juries are expected to consider complicated facts and instructions and that our adversary system relies upon their ability to do so before reaching their conclusions. It is also true that jurors are

may not understand fully the reason for settlement.¹⁶⁵ This lack of understanding may prejudice the plaintiff if the jury uses the settlement amount as a gauge in determining damages or considers the settlement as an admission of liability.¹⁶⁶ As the Michigan Supreme Court in *Brewer* recognized, a small settlement compared to plaintiff's claim could be used as a measure of actual damages, while a large settlement might cause the jury to conclude that the settling party was primarily or totally liable.¹⁶⁷ The Alaska Supreme Court in *Luth* held that informing the jury of the settlement and amount was objectionable because of the potential for inadequate damage verdicts resulting in frustration of the policy of encouraging extra-judicial settlements.¹⁶⁸ These same courts, *Luth* and *Brewer*, also observed that the defendant could be prejudiced when the jury has knowledge of a settlement and its amount.¹⁶⁹ Both courts noted that a jury might conclude that the non-settling defendant is liable from what appears to be an admission of liability by the settling party.¹⁷⁰ Adopting the "court method," the *Brewer* and *Luth* courts concluded that because the court performs the settlement deduction the jury need not have knowledge of a settlement or its amount unless there are questions of fact regarding the settlement.¹⁷¹

It is submitted that withholding evidence of settlement and amount paid as was done in *Brewer* and *Luth* will promote verdicts consistent with the evidence presented when juries are not confused by the facts of settlement. Therefore, the approach advocated by *Steele* is inadequate to

human and so are subject to suggestion and sometimes to confusion concerning the relative importance of a mass of factual material and its relationship to instructions from the bench.

412 Mich. at 678-79, 316 N.W.2d at 705.

165. See, e.g., *Brooks v. Daley*, 242 Md. 185, 194, 218 A.2d 184, 189 (1966) (settlement could have caused jury confusion in assessing damages and could have been misconstrued as admission of liability by settling party); *Azure v. City of Billings*, 182 Mont. 234, 245-46, 596 P.2d 460, 467 (1979). In *Azure*, the jury was informed of plaintiff's settlement for \$10,000 in a suit where plaintiff sought over \$1,000,000 in damages. *Id.* at 244, 596 P.2d at 466. The Supreme Court of Montana considered the fact of settlement as an extraneous factor that could have affected plaintiff because the jury award was only \$20,000 yet undisputed wage losses and medical expenses exceeded \$60,000. *Id.* at 245-46, 596 P.2d at 467. The *Azure* court observed that the jury did not know the plaintiff settled for \$10,000 because it was the limit of the settling party's insurance policy. *Id.* at 246, 596 P.2d at 467.

166. *Brewer*, 412 Mich. at 677, 316 N.W.2d at 704 (jury could use settlement amount as measure of damages); see also *Brooks v. Daley*, 242 Md. 185, 194, 218 A.2d 184, 189 (1966) (settlement could have been misconstrued as admission of liability).

167. *Brewer*, 412 Mich. at 677, 316 N.W.2d at 704.

168. *Luth*, 507 P.2d at 768.

169. *Id.*; *Brewer*, 412 Mich. at 678, 316 N.W.2d at 705.

170. *Luth*, 507 P.2d at 768; *Brewer*, 412 Mich. at 678, 316 N.W.2d at 705.

171. *Luth*, 507 P.2d at 705; *Brewer*, 412 Mich. at 679, 316 N.W.2d at 705. For a general discussion of the court rule, see *supra* note 38.

prevent prejudice to the plaintiff and defendant.¹⁷²

It is suggested that the *Brewer* approach which precludes the jury from learning of a settlement with another tortfeasor is the most equitable approach because it avoids potential prejudice to the plaintiff and defendant, focuses the jury on the crucial questions of liability and full compensation, and encourages settlements.¹⁷³

Prejudice to the non-settling defendant is avoided because the rule prohibits the jury from imputing the settling defendant's "admission" of liability to the non-settling defendant.¹⁷⁴ Similarly, prejudice toward the plaintiff is diminished because the jury will not treat the settlement as an admission of total liability by the settling defendant and speculate that the non-settling defendant may not be liable.¹⁷⁵ Thus, the *Brewer* and *Luth* approaches decrease the potential prejudice to the defendant and plaintiff more effectively than do the approaches of *Greenemeier* and *Steele*.¹⁷⁶

Furthermore, since prohibiting the introduction of a plaintiff's prior settlement with another defendant reduces the potential prejudice to the plaintiff in his trial with the remaining defendant, settlements are encouraged instead of discouraged.¹⁷⁷ The *Brewer* court reasoned that settlements are encouraged because prohibiting evidence of a settlement reduces the plaintiff's fear that his damages or chance of recovery

172. For a discussion of the approach advocated by *Steele*, see *supra* notes 130-34 and accompanying text.

173. For a discussion of the approach that prohibits the jury from being informed of a settlement, see *supra* notes 45-101 and accompanying text.

174. See *Luth*, 507 P.2d at 768. In *Luth*, the court noted that "[s]ubmitting the matter to the jury might prejudice the unreleased defendant, for the jury might imply his negligence from the virtual admission of negligence by the covenantor." *Id.*; see also *Azure v. City of Billings*, 182 Mont. 234, 245, 596 P.2d 460, 467 (1979) ("there is too great a danger that the jury will be adversely influenced by extraneous factors which will creep into the jury's decision-making process").

175. See *Luth*, 507 P.2d at 768 (disclosing settlement creates risk that payment of money for covenant not to sue might be evidence of the settling defendant's total liability and exculpate remaining defendant); *DeLude*, 351 Ill. App. at 473, 115 N.E.2d at 565 ("jury considers [settlement] evidence that the covenantor is the party responsible for the injury and that defendant or defendants should be exculpated"); *Brewer*, 412 Mich. at 678, 316 N.W.2d at 705 (mere fact of settlement could suggest liability on part of blameless non-settling defendant); see also *Brooks v. Daley*, 242 Md. 185, 193-94, 218 A.2d 184, 189 (1966) (settlement "could be construed incorrectly as an admission of liability on the part of the settling third party defendant").

176. For a discussion of the *Brewer* approach, see *supra* notes 92-101 and accompanying text.

177. See, e.g., *Luth*, 507 P.2d at 768 (to extent disclosure can result in uncertain or inadequate verdicts "policies encouraging extra-judicial settlements will be frustrated"); *DeLude*, 351 Ill. App. at 474, 115 N.E.2d at 565 (introducing evidence of covenant not to sue jeopardizes plaintiff's opportunity for fair trial and tends to discourage settlements); *Cleere v. United Parcel Serv.*, 669 P.2d 785, 789 (Okla. Ct. App. 1983) (disclosure frustrates policy of settling lawsuits).

may be lessened when the jury knows of a settlement.¹⁷⁸

In addition, prohibiting the introduction of the existence of a settlement permits the jury to focus on the crucial task of determining the liability of the remaining defendants and the total compensation for the plaintiff should the defendant be held liable.¹⁷⁹ As *Brewer* emphasized, although jurors are expected to consider complicated facts and instructions, they may become unnecessarily confused if overwhelmed with a mass of factual information.¹⁸⁰

More importantly, when deciding whether a jury should be informed of a settlement or its amount, courts should focus on maximizing fairness to all parties and minimizing the prejudice to both the plaintiff and the defendant, rather than on choosing an approach which is merely compatible with its method of calculating damages where there has been a settlement.¹⁸¹ It is suggested that the court should first decide whether the plaintiff or defendant could be potentially prejudiced if the jury knew about a previous settlement.¹⁸² Depending upon its appraisal of potential prejudice to the parties, the court can decide what method to employ to calculate damages.¹⁸³

178. See *Brewer*, 412 Mich. at 677, 316 N.W.2d at 704. The court stated: [I]ntroduction to the jury of the settlement . . . could appear to the jury as an admission of liability, but with the real defendant out of the lawsuit. . . . [The plaintiff] argues that the jury could use the settlement amount as a measure of damages. If the settlement was for a relatively low amount compared to plaintiff's claim, plaintiff fears the jury would use it as a measure of actual damages.

Id.; see also *DeLude*, 351 Ill. App. 466, 474, 115 N.E.2d 561, 565 (introduction of covenant would jeopardize plaintiff's opportunity for fair trial and tend to discourage settlements).

179. See *Luth*, 507 P.2d at 766. The trial court refused to admit evidence of a covenant not to sue because the covenant was irrelevant to the primary issue of the defendant's vicarious liability. *Id.*; accord *Theobald* 40 N.J. at 304, 191 A.2d at 469-70. Although the *Theobald* court held that the jury should be informed of the settlement but not the amount, the jury instructions regarding the jury's duty to award total compensation for the plaintiff's injuries and losses are appropriate. *Id.* at 307-08, 191 A.2d at 471-72. For the relevant text of the court's instructions, see *supra* note 115.

180. *Brewer*, 412 Mich. at 678-79, 316 N.W.2d at 705. "If facts . . . have or should have no bearing upon either liability or ultimate damages, there appears to be little cause to burden the jury with the added duty of calculating a liquidated settlement into its deliberations." *Id.* at 679, 316 N.W.2d at 705; see also *Azure v. City of Billings*, 182 Mont. 234, 247, 596 P.2d 460, 467 (1979) ("the trial court can tell the jury that it is to concern itself only with the issues before it and must not discuss or speculate why other persons are not also defendants in the action").

181. See, e.g., *Haley*, 394 S.W.2d at 415 (court instructed jurors to deduct settlement amount from determination of plaintiff's total damages making it necessary for court to inform jury of settlement and amount paid).

182. See *Brooks v. Daley*, 242 Md. 185, 193, 218 A.2d 184, 189 (1966) (evidence of settlement should not be admitted because of prejudicial effect to plaintiff).

183. See *Luth*, 507 P.2d at 766 (trial court correctly barred evidence of settlement and reduced jury's award by amount of settlement).

It is further submitted that the *Greenemeier* approach of advising the jury of the fact of settlement is insufficient because it increases the possibility of prejudice to plaintiff and defendant where the jury imputes liability or lack of liability to the defendant.¹⁸⁴ Additionally, the *Greenemeier* approach deters settlements¹⁸⁵ and overreacts to the possibility that jurors will speculate about absent defendants.¹⁸⁶ To alleviate the problems of the *Greenemeier* approach yet remain within the confines of *Brewer*, the court need only recognize the existence of absent parties without informing the jury of their status.¹⁸⁷ Proper jury instructions can eliminate or greatly reduce any speculation about absent defendants.¹⁸⁸

Under the *Brewer* approach, the trial court should instruct the jury not to speculate about why other potential defendants are not parties to the action and to concern itself only with the issues presented.¹⁸⁹ As the Supreme Court of Montana observed in *Azure v. City of Billings*,¹⁹⁰ the trial court will take care of these factors after the jury has reached its verdict.¹⁹¹

It is suggested that the court give clear, unequivocal instructions that the jurors are to award damages which *fully* compensate the plaintiff

184. See *Brewer*, 412 Mich. at 678, 316 N.W.2d at 705. But see *Greenemeier*, 719 P.2d at 715 (advising jury of interrelation of claims against settling and non-settling parties minimizes risk that jury will impute liability or lack of liability).

185. See *Brewer*, 412 Mich. at 679, 316 N.W.2d at 705 (uncertainty of juror reaction to fact of settlement considered foreseeable deterrent to settlements between plaintiffs and co-defendants).

186. See *Azure v. City of Billings*, 182 Mont. 234, 246-47, 596 P.2d 460, 467 (1979) (although jury may be curious about absent potential defendants, court can tell jury to be concerned with relevant issues and not speculate about absent defendants). But see *Greenemeier*, 719 P.2d at 715 (advising jury of settlement avoids prejudicial inferences which arise if jurors speculate about absent defendants).

187. See *Azure v. City of Billings*, 182 Mont. 234, 247, 596 P.2d 460, 467 (1979). The Supreme Court of Montana observed:

In some situations perhaps a settlement has been reached with a person not then a defendant in the case; and in other cases perhaps a settlement has not been reached; or perhaps another person, for whatever reasons, has not been sued. Nonetheless, the trial court can tell the jury that it is to concern itself only with the issues before it and must not discuss or speculate why other persons are not also defendants in the action.

Id.

188. For a discussion of the use of jury instructions to reduce speculation about absent defendants, see *supra* note 187.

189. *Azure v. City of Billings*, 182 Mont. 234, 246-47, 596 P.2d 460, 467 (1979) (it is natural that jury would be curious as to why all potential defendants are not before court).

190. 182 Mont. 234, 596 P.2d 460 (1979).

191. *Id.* at 247, 596 P.2d at 467; see also *Brewer*, 412 Mich. at 679, 316 N.W.2d at 705 (following jury verdict, upon motion by defendant, court shall make necessary calculation and find amount by which jury verdict will be reduced).

for all his injuries and losses. This suggestion is also applicable to the two minority approaches.¹⁹² The *Theobald* court stressed that the computation of damages must be made without regard to the total number of persons involved in the incident causing the damages.¹⁹³ This instruction is essential whether the court or the jury deducts the settlement amount from the plaintiff's total damages because the plaintiff's total damages will be reduced as a result of the settlement.¹⁹⁴

Although it is submitted that the *Brewer* approach is proper, there are occasions when an exception to the general rule is necessary to avoid prejudice.¹⁹⁵ The *Azure* court recognized that when there are factual controversies regarding a settlement, the jury should be informed of the fact and perhaps even the amount paid.¹⁹⁶ Recognizing that the trial court can best evaluate the circumstances which may indicate the need for a deviation from the usual rule, the *Greenemeier* court concluded that the trial court was to have such discretion to deviate.¹⁹⁷ In *Ashby*, the Florida Court of Appeals refused to find an exception to the rule of non-disclosure and ruled that the trial court erred in allowing plaintiff to introduce a settlement to rebut defendant's references to the settled defendant as an "independent eyewitness."¹⁹⁸ While the relevant Flor-

192. See, e.g., *Yardley v. Rucker Bros. Trucking*, 212 Or. App. 239, 242, 600 P.2d 485, 487 (1979) (settlement may be disclosed "provided that the court then instructs the jury in unequivocal language to disregard the settlement and return a verdict for the full amount of the plaintiff's damages"); see also *Greenemeier*, 719 P.2d at 714; *Theobald*, 40 N.J. at 304, 191 A.2d at 469-70. In *Greenemeier*, the court stated that the "jury must also be directed that if it concludes that the defendant is liable, it must return an award that fully compensates the plaintiff for all of his injuries without regard to the fact that the plaintiff may have received compensation from others as a result of the settlement." 719 P.2d at 714-15. For the relevant text of the jury instructions proposed by the *Theobald* court, see *supra* note 115.

193. *Theobald*, 40 N.J. at 304-05, 191 A.2d at 470.

194. See UCATA § 4(a), 12 U.L.A. at 98. A release given to a defendant at the time of settlement "reduces the claim against the others to the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it whichever is the greater." *Id.* For a discussion of the two methods used by courts in determining the effect of a settlement and release on the plaintiff's claim against the remaining defendants, see *supra* notes 32-43 and accompanying text.

195. See *Greenemeier*, 719 P.2d at 715 (varying circumstances caution against adoption of absolute rule); *Azure*, 182 Mont. at 247, 596 P.2d at 467 ("a certain amount of discretion must be vested in the trial court so that each situation can be dealt with on a separate basis").

196. *Azure*, 182 Mont. at 247, 596 P.2d at 467. The *Azure* court explained that an obvious example of when the jury should have knowledge of the settlement amount is the proper reapportionment of damages among several tortfeasors who are jointly and severally liable to plaintiff. *Id.*

197. *Greenemeier*, 719 P.2d at 715-16. The *Greenemeier* court indicated that a trial court choosing to deviate from the general rule should specify its reasons in order to facilitate appellate review. *Id.*

198. 458 So. 2d at 336. For the relevant facts of *Ashby*, see *supra* text accompanying notes 55-57.

ida statute prohibits informing the jury of a settlement,¹⁹⁹ it is submitted that in order to reduce potential prejudice to the plaintiff, the appellate court should have recognized an exception to show possible bias of a witness.²⁰⁰ In such an instance, the concern of *Brewer* of promoting settlements is no longer present, and the prejudice to the plaintiff outweighs any prejudice to the defendant.

The Pennsylvania rule of evidence applied in *Weingrad* and Rule 408 of the Federal Rules of Evidence permit limited exceptions to the rule of nondisclosure of settlements.²⁰¹ The stricter Pennsylvania rule allows evidence of a settlement only where the final settlement has been pleaded as a complete defense.²⁰² Rule 408 of the Federal Rules of Evidence permits admission of evidence of a settlement for other purposes such as proving bias or prejudice of a witness.²⁰³ The Pennsylvania and Federal Rules of Evidence are attempts to promote the proper balance suggested in this note. Generally, evidence of the existence and the amount of settlement should be withheld from the jury except in those rare instances where undue prejudice results because an adverse party's evidence remains unchallenged.²⁰⁴

V. CONCLUSION

While joint and several liability remains a viable doctrine in many jurisdictions, the problem of what evidence should be admitted for the jury's consideration when one or more jointly liable defendants settle

199. See FLA. STAT. ANN. § 768.041(3) (West 1986). For the text of section 768.041(3), see *supra* note 52.

200. See *Ashby*, 458 So. 2d at 336-37. The *Ashby* court referred to a previous Florida case where the plaintiff had argued that the defendant "had opened the door to the issue of the witness's credibility" but the court refused to admit evidence of a settlement "except under unusual circumstances." *Id.* (citing *City of Coral Gables v. Jordan*, 186 So. 2d 60 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966)). In *Jordan*, the Florida District Court of Appeals indicated that "unusual circumstances exist where some species of fraud or other questionable practice is indulged in to procure or influence" the testimony of a witness. 186 So. 2d at 63 (quoting *Fenberg v. Rosenthal*, 348 Ill. App. 510, 518, 109 N.E.2d 402, 405 (1952)). Although the plaintiff in *Ashby* was concerned about biased testimony of the witness who had settled, the appellate court refused to recognize this as an unusual circumstance. 458 So. 2d at 336-37.

201. See FED. R. EVID. 408; 42 PA. CONS. STAT. ANN. § 6141(c) (Purdon 1982). For the text of FED. R. EVID. 408, see *supra* note 69. For the text of section 6141(c), see *supra* note 60.

202. 42 PA. CONS. STAT. ANN. § 6141(c) (Purdon 1982). For a discussion of *Weingrad* in which section 6141(c) was applicable, see *supra* notes 60-68 and accompanying text.

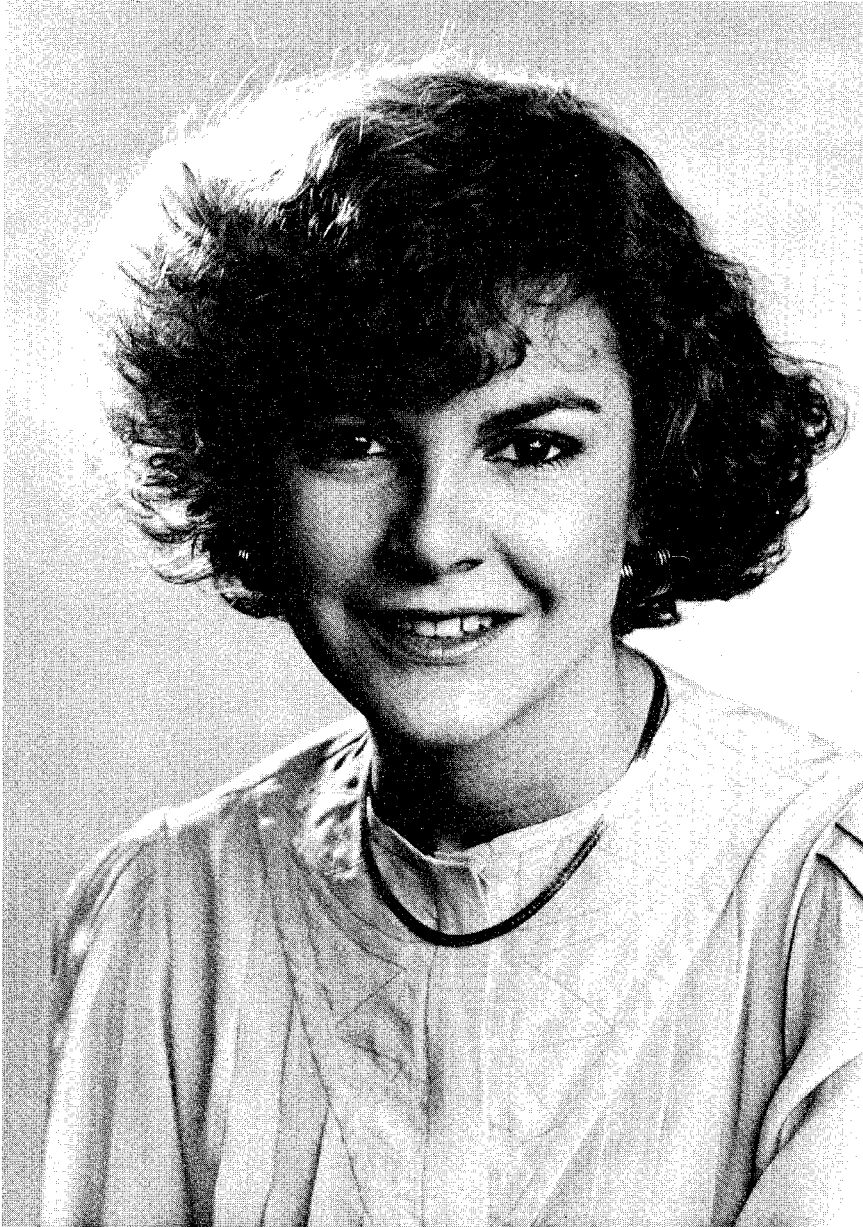
203. FED. R. EVID. 408. For a discussion of rule 408 and application of the rule in *Young*, see *supra* notes 69-76 and accompanying text.

204. See *Young*, 539 F. Supp. at 196 (trial judge should weigh need for evidence admitted under exception against potential discouragement of future settlements) (citing 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 408[05] (1978)). For a discussion of exceptions to the general rule of nondisclosure, see *supra* notes 195-203 and accompanying text.

with a plaintiff exists. For several decades, courts have established a three-way split regarding what the jury should be told about a plaintiff's settlement and amount paid. How courts view the role and competence of the jury has provided the basis for the courts' approaches to this problem. Although courts advocating an approach provide some rationale for their choice, the approach that prohibits informing the jury of the existence or amount of settlement appears to be the best approach for avoiding prejudice to the plaintiff and defendant and encouraging settlements because it prevents juries from speculating about the liability of settled defendants.

Cynthia A. Sharo

In Memoriam



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VILLANOVA UNIVERSITY LAW SCHOOL, CLASS OF 1988
MARCH 9, 1963 TO JULY 15, 1987

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